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THE LAW OF FRAUD.

A TREATISE
ON
THE LAW OF FRAUD
ON ITS CIVIL SIDE

BY
MELVILLE M. BIGELOW
PH. D. HARVARD

VOLUME II.

BOSTON
LITTLE, BROWN, AND COMPANY
1890

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JOHN WILSON AND SON, CAMBRIDGE.

PREFACE.

FRAUD, I am sure, is a simpler matter in the law than it is commonly taken to be. I speak of its civil side. That side easily divides itself into two parts. In the one the person defrauded and the person defrauding have been dealing with each other; that part is 'deception.' In the other they have not been dealing with each other; that part is 'circumvention.' Each has its own incidents and consequences, but each bears to the other, in one essential thing, a family resemblance to the genus fraud. Let me state that essential thing in the shortest and clearest way : —

In most cases the wrongfulness of the 'endeavor to alter rights' may be made out, alike in deception and in circumvention, by conduct as distinguished from motive, by something done regardless of any personal intention to commit fraud; the conduct being not merely evidence of fraud but establishing it.

In actions for deceit knowledge of falsity must in many cases be presupposed; but the most essential thing in the ordinary, popular meaning of deceit is personal intention to deceive, and that drops out of the word, in most cases, in the mouth of a judge. Indeed it is conceded that knowledge of falsity may

be found, as matter of evidence, by external facts; facts which would show that a reasonable man would have known that the representation was false are evidence that the defendant knew this, though that evidence must not be taken as necessarily establishing the knowledge.

Conduct then, as an externality, being sufficient to constitute fraud, it is only necessary to state what that conduct must be to state what fraud (as a civil offence) is; and that is scarcely more difficult than to say that personal intention is sufficient, except that it takes more time. This is not the place to go over the ground, even summarily, of the text; but it will be proper here to state briefly the cases into which personal intention enters as a necessary part of the alleged fraud. In a case¹ before the House of Lords, cited in the first volume, an attempt had been made to fasten upon a disponee under a will a trust in favor of another by reason of an alleged undertaking by him to carry out, in favor of that other, a desire of the testator. Lord Westbury now declared in the plainest language that such a case could be made out by nothing short of *malus animus*, and that by the clearest and most indisputable evidence; presumption could not take the place of proof for 'fixing the *criminal* character of fraud' upon the disponee. 'You must show distinctly that he knew that the testator or the intestate was beguiled and deceived by his conduct.' So again it is commonly laid down that to overturn a judgment for

¹ *McCormick v. Grogan*, L. R. 4 H. L. 82. It is particularly mentioned here, because it was overlooked in regard to the point now under consideration.

fraud, the facts must show 'meditated and intentional contrivance to keep the parties and court in ignorance of the real facts of the case.'¹ These are the chief cases requiring personal intention, under the head of deception.

Under the head of circumvention all except special cases turning upon peculiar statutes (which, because they are peculiar, have little bearing upon the nature of fraud), or upon peculiar circumstances, may be summed up in the statement, that personal intention to defraud is necessary only when the party complaining of fraud cannot make out his case by any external act or conduct. If the transaction is innocent on the external facts which brought it into existence and constitute it, nothing, it is obvious, can be done unless the complaining party can prove that it was founded in personal intention to defraud. This is the domain chiefly of statute; and it was left for statute to give the best illustration of the well-known doctrine of Holmes on the Common Law.

Whether the attempt made in this work to show that fraud as a whole may be usefully defined has been successful, or how far it has been successful, may not be seen at once. Whether the attempt was wise, I am not permitted to doubt. It should signify little that a century and a half ago Lord Hardwicke said that fraud could not, or rather should not, be defined. The subject had not been much explored, and there was fear of the wit of rogues. Since Lord Hard-

¹ *Patch v. Ward*, L. R. 3 Ch. 203, 207; *Verplanck v. Van Buren*, 76 N. Y. 247, 257; vol. 1, p. 87.

wicke's time materials have multiplied on every side, and the subject has been examined from every point of view by many acute intellects; so that it were like want of ordinary courage to go on repeating an old saying. Would no one question it? I ventured, — nor thought it an act of any special courage, — impressed with the conviction that if, at the end, the subject should not be left a stage in advance of the place where it was taken up, the result would be due to the handling.

But it may be said that while it is well enough to try to define the word 'fraud,' it is not worth while to say so much about it. The answer is, that this work is written with a very definite purpose, more apparent perhaps in this second volume than in the first; it is a work *against* as well as concerning fraud. In that view it is particularly necessary to scrutinize and define, if possible, the meaning which the law attaches to the term; and time devoted to such a purpose cannot be thrown away. It is worth while surely to endeavor to strengthen the hands of the courts in dealing with what is at once the most subtle and the most threatening evil of the times, and to show that the law itself, properly understood, is more fully equipped for the purpose than is sometimes supposed. The line of authorities in New York on fraudulent conveyances, from Walworth, through Bronson and Denio, Comstock and the Seldens, matchless in American jurisprudence, is exceptionally sound assurance of the fact;¹ well for the newer states which look that way for help.

¹ See pp. 370, 371, note.

It may turn out that deception and circumvention together do not embrace all of fraud even 'on its civil side.' If so, very well; for it may still have been useful to point out that these are the two great continents in the geography of fraud, and to map out and survey the whole territory, a thing which other works on fraud, valuable as they are, have not professed to do. And it should be understood that the object of the book is not merely to show that fraud may be defined, and to explain the definition, — it would be lamentable to think that that should require two volumes, — but to portray the whole domain of law relating to fraud as a civil offence, its incidents and consequences not less than its nature. While therefore the general lines of thought converge upon the definition, much more remains to complete the work.

M. M. B.

BOSTON, *September*, 1890.

NOTE.

It is right to inform the reader that the net result of the authorities on the nature of fraud in the way of circumvention is given in chapter 15.

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CIRCUMVENTION.

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CHAPTER I.

DEFINITION OF CIRCUMVENTION.

FRAUD RECONSIDERED.

It has been stated in the first volume of this work that fraud has two branches, deception and circumvention;¹ that deception is here to be understood as implying some present transaction between the party deceiving and the party deceived, and thus touches the motives to the action of the latter; that in circumvention, as the term is used in this work, there is no present transaction between the two parties, so that the fraud does not touch the motives of the party defrauded. It was also shown that a substantial distinction in law separates the two branches of the subject, in that deception regularly leads to an action for damages, though not to that alone; while circumvention purely does not lead to such an action except in very peculiar cases.² The subject of deception has been examined accordingly; circumvention remains to be considered.

Before proceeding however with the new subject, attention should be recalled to the essential fact that fraud, in the

¹ The definition of 'fraud' there given is this: Fraud consists in endeavor to alter rights by deception touching motives, or by circumvention not touching motives. Vol. 1, p. 5.

² See vol. 1, p. 18, and note. Circumvention *with* deception may lead to a suit for damages. Ib.

proper sense, or at least in the sense in which the term, when it is needful to speak precisely, is used in this book, should be understood as involving guilt.¹ But it should be observed that this does not imply a standard based upon individual morality, any more than does 'guilty' in trespass; one is apt to be misled by the circumstance that moral guilt is commonly present in point of fact in cases of fraud. The following doctrine will, it is believed, be made out in these pages: The standard by which to determine of the existence of guilt is to be found in the common conscience; that is, in the conscience, and so in the judgment, of an ideal person who in the language of the new photography may be called the 'composite' man, who in the law is commonly called the 'average' man. When the common conscience would repudiate conduct, apart perhaps from mere breach of contract, there is guilt; it matters not that the offender, whether believing all acts of the kind rightful, or not in fact knowing just what he is doing, may have intended no wrong, and so may have a clear conscience. If on the facts the average man would have intended wrong, that is enough.² The object of civil administration is payment, not punish-

¹ Vol. 1, p. 4. See also 'Deception,' p. 465. The point, however, was not dwelt upon and explained in vol. 1; hence the consideration of it here.

² It is the facts at the time of the transaction that make (*actual*) fraud, not the turn of some later event. *Columb v. Caldwell*, 16 N. Y. 484; *Leitch v. Hollister*, 4 Comst. 211; *Barney v. Griffin*, 2 Comst. 365. 'As to the matter of fraud, the same ought to be fraud at the beginning.' Sir Edward Coke in *Stone v. Grubham*, 2 Bulst. 225; *Weller v. Wayland*, 17 Johns. 102. Secus in many cases of constructive fraud; that may be by conduct subsequent. Vol. 1, p. 384. As in certain cases under these statutes of Elizabeth.

Laughton v. Harden, 68 Maine, 208, 212. See *Townshend v. Windham*, 2 Ves. 1, 11, Lord Hardwicke; vol. 1, pp. xi-xiii, 11, 12. On the other hand, if there was fraud in the beginning, nothing afterwards will 'anyways salve and amend the matter' (except of course ratification, condonation, or the like). Coke, *ut supra*, on 13th Eliz. c. 5. See *Leitch v. Hollister*, 4 Comst. 211; *Wilson v. Berg*, 88 Penn. St. 167; *Lynde v. McGregor*, 13 Allen, 172, 181; *Law v. Payson*, 32 Maine, 521. Subsequent purchase for value without notice may, in a sense, be said to purge the prior fraud. *Oriental Bank v. Haskins*, 3 Met. 332. Further as to purging fraud see chapter 16.

ment.¹ And at a time when fraud, the most difficult of all mischiefs to deal with, has become an alarming evil, if not a menace to the state, it is important to dwell upon the subject.

This conception of fraud (and since it is not the writer's, he may speak of it without diffidence), steadily kept in view, will render the administration of the law less difficult, or rather will make its administration more effective. Further, not to enlarge upon the last matter, it will do away with much of the prevalent confusion in regard to 'moral' fraud, a confusion which, in addition to other things, often causes lawyers to take refuge behind such convenient and indeed useful but often obscure language as 'fraud upon the law.'² What is fraud upon the law? Fraud can be committed only against a being capable of rights,³ and 'fraud upon the law' darkens counsel. What is really aimed at in most cases by this obscure contrast between moral fraud and fraud upon the law, is a contrast between fraud in the individual's intention to commit the wrong and fraud as seen in the obvious tendency of the act in question.

But the application of the standard is not without its difficulties; there are occasional aberrations from it, which some may consider as real qualifications. Indeed, while the existence of the standard has perhaps always been recognized in a general way, its real significance and wide application have but recently been pointed out.⁴ The test applied in most cases, of the defendant's actual knowledge of the falsity of a representation made by him, in certain actions for deceit,⁵ is an example of the partial missing, some may say of the

¹ It is no answer that in certain circumstances punitive damages may be given in a civil suit, or that consequences of a criminal nature sometimes follow in the train of civil proceedings.

² Vol. 1, p. 7.

³ *Ib.* The wrong called 'fraud upon the law' may be committed upon the sovereign or upon individuals. *Ib.*

⁴ The credit belongs to Mr. (now Mr. Justice) Holmes, in his Lectures on the Common Law. *Peek v. Derry*, *infra*, is a strong following.

⁵ *Tryon v. Whitmarsh*, 1 Met. 1; *Pearson v. Howe*, 1 Allen, 207; *Carroll v. Hayward*, 124 Mass. 120; *Salisbury v. Howe*, 87 N. Y. 128; *McKown v. Furgason*, 47 Iowa, 686.

rejection, of the standard.¹ This test was recently rejected by the English Court of Appeal for that of reasonable ground of belief; but the House of Lords restored the old rule.² Another case of apparent but not real departure from the standard, falling under the head of circumvention, may be mentioned, namely, where statute, or it may be the common law, has for special reasons fixed some individual or particular test instead of the general standard; as where the effect of a payment by an insolvent debtor to one of his creditors, to the detriment of the rest, is made to turn upon the debtor's 'view' to giving a preference.³ The implication is plain enough; if the payment was made without a view of preferring the creditor, it is valid.⁴ But would it not be within the statute if made under circumstances which would show that the average man would have had such a view, though the particular debtor may not have had anything of the kind,—by 'circumstances' being meant something besides the mere fact that a preference results?⁵ That is, would not such 'circumstances' be more than evidence of the debtor's purpose?—would they not show, as matter of law, a view to preference?⁶ The question cannot be answered

¹ Vol. 1, p. 511.

² *Derry v. Peek*, 14 App. Cas. 337, reversing *Peek v. Derry*, 37 Ch. D. 541, C. A., reported since vol. 1 of the present work was published. See also *Cann v. Willson*, 39 Ch. D. 39. The tendency was towards obscuring the boundary between fraud and negligence. That might cause trouble; but more good than harm was likely to come of it. One of the results would be to enable a person, in some cases, to sue either for negligence or for deceit, at his election. The case of *George v. Skivington*, L. R. 5 Ex. 1, comes readily to mind.

³ English Bankruptcy Act, 1883, § 48; *Ex parte Taylor*, 18 Q. B. D.

295, C. A.; *Wilson v. City Bank*, 17 Wall. 473.

⁴ *Ex parte Taylor*, 18 Q. B. D. 295, C. A.; *Ex parte Hill*, 23 Ch. D. 695, C. A.; *Ex parte Topham*, 8 Ch. D. 614, C. A.

⁵ It is not enough that a preference takes place. *Ex parte Taylor*, 18 Q. B. D. 295, 299, Lord Esher.

⁶ Preference however is not in itself a fraud; though in a case of insolvency it should be made such. In *Crosby v. Crouch*, 2 Camp. 165, 168, Lord Ellenborough defends preferences in contemplation of bankruptcy; and there is a passage obiter in the opinion of James, L. J. in *Ex parte Stubbins*, 17 Ch. D. 58, 68, which is difficult to un-

on direct authority; but language from the bench in a case of preference and something more may be cited.¹ At all events it is view to *preference*, not to fraud.

Whatever the true view of special cases, there is sufficient ground for the declaration that the general standard should be applied to the second branch of fraud. That conduct will be shown, in general, to amount to fraudulent circumvention which would be fraudulent in the average man, regardless of the actual motive, or personal factor;² though of course

derstand. The passage is this: 'A mere voluntary transfer, impeachable only on the ground that it is a preference of a particular creditor, has never been held to be in itself a fraud or an act of bankruptcy.' Against this, in its apparent meaning, unless 'in itself' means 'apart from statute,' or 'absolutely,' may be placed the language of Cockburn, C. J. in *Bills v. Smith*, 6 Best & S. 314, 318, that the debtor's act, unexplained, would carry a presumption that he intended to act in fraud of the bankrupt law. See also *Smith v. Pilgrim*, 2 Ch. D. 127; and the language of the statute itself, 32 & 33 Vict. c. 71, § 92; 46 & 47 Vict. c. 52, § 48.

Reduced to its lowest terms the case in principle comes to this: An insolvent debtor, knowing his insolvency, turns over to and for creditor A the part of his estate to which he knows creditor B is entitled. Now that part, morally speaking at least, the insolvent held, as he knew, in trust for B; can then his turning it over to another, unexplained, be anything short of fraud according to the common conscience? *Thompson v. Furr*, 57 Miss. 478, indicates a negative. Would not the average man say that a (virtual) trustee who, knowing what he was doing, should give the trust property to a creditor of his instead of handing it over to the cestui que trust, was presumptively guilty of

fraud? Compare *Knatchbull v. Hallett*, 13 Ch. D. 696, C. A. Preference however is an affair of bankruptcy and insolvency laws; except in the administration of such laws, it has found no place in the law. *Willmott v. London Celluloid Co.*, 34 Ch. D. 147, C. A.; *Eastman v. Eveleth*, 4 Met. 137, 148; *Burt v. Perkins*, 9 Gray, 317. See *infra*, p. 7, note. Hence one creditor may be preferred to another under the statutes of Elizabeth, though with intent to defeat the latter. *Wood v. Dixie*, 7 Q. B. 892; *Darvill v. Terry*, 6 Hurl. & N. 807; post, chapter on Fraudulent Open Preference.

¹ 'If persons will take from a man who is in difficulties a deed . . . which has the effect of withdrawing, and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him, and bankruptcy ensues, the deed is void under the bankruptcy law. It is fraudulent as well as void, whatever may have been the view of those who were engaged in the transaction, that it might be the best thing for the debtor, or that it might afford an effectual way of paying the creditors.' *Cotton, L. J. in Ex parte Chaplin*, 26 Ch. D. 319, 331, C. A.

² See such cases as *Potts v. Hart*, 99 N. Y. 168; *Young v. Heermans*, 66 N. Y. 374; *Cole v. Tyler*, 65 N. Y.

proof of a fraudulent motive in the individual would be effectual.¹ We have spoken here of fraudulent circumvention, for indeed there may be circumvention which is not fraudulent, just as there may be misrepresentation which is not fraudulent; and this in more than one way. A policeman may circumvent a rogue, a detective may circumvent the plottings of anarchists, a general may circumvent the enemy, without being guilty of fraud; this is why the Roman law so often speaks of 'dolus malus' instead of 'dolus' merely.² There is another way in which there may be circumvention, in a sense, without fraud; and that more to the present purpose. An act may work the *effect* of intended circumvention, and for that reason be actually treated, for some purposes, as unlawful. A man supposing himself to be solvent may make a gift of his property under circumstances which to the average man at the time would justify the act; but if he was in fact insolvent, the gift will be unlawful towards his creditors.

Acts like the one just mentioned are sometimes spoken of as fraudulent; they are often discussed in connection with the

73; *Stucky v. Masonic Sav. Bank*, 108 U. S. 74 ('reasonable ground to believe' a debtor insolvent, under federal statutory law expressly declarative, as far as it goes, of the standard, *supra*); *Merchants' Bank v. Cook*, 95 U. S. 842 (same sort of case); *Purinton v. Chamberlain*, 131 Mass. 589 (same, under Mass. stat.); *Winchester v. Charter*, 102 Mass. 272; *Kimball v. Thompson*, 4 Cush. 441; *Freeman v. Pope*, L. R. 5 Ch. 538, 540; *Ex parte Chaplin*, 26 Ch. D. 319, C. A.; *Ex parte Jackson*, 14 Ch. D. 725, C. A. In none of these cases is the absence of a motive of wrongdoing allowed to be a factor for consideration; and the number of examples might be extended indefinitely.

¹ The evidence is often in point of fact directed to the personal motive,

because there are no external facts of significance as to the fraud. Indeed the standard itself must not be pushed too hard; it expresses a general truth in jurisprudence, to be applied in ordinary cases. The general set of the legal current is shown by it; but here and there will be found eddies and perhaps counter currents; and there may be criminal or special statutes or peculiar situations, as the text already intimates. See e. g. *Hoyt v. Godfrey*, 88 N. Y. 669; *Strang v. Bradner*, 114 U. S. 555; *Wolf v. Stix*, 99 U. S. 1; s. c. 96 U. S. 541; *Neal v. Clark*, 95 U. S. 709; *McPike v. Atwell*, 34 Kans. 142.

² Dig. 4, 3, 1, 2; vol. 1, p. 4, note. It is plain that such cases may be cases of pure circumvention, i. e. without deception.

general law of fraud upon creditors, and rightly enough. But in reality an act of the kind is only unlawful; it is called fraudulent only because it is associated with other acts that really are fraudulent, and it is unnecessary in ordinary cases to make any distinction. To be accurate, to deal with the subject of fraud in the light of the common conscience, such an act should be termed unlawful; or if the word 'fraudulent' is used, it must be understood in the sense of 'constructively fraudulent.' An act does not involve guilt merely because it is unlawful.¹

It may not always be necessary to observe this distinction; but the distinction is real in morals, and it is apprehended that it is not merely academic in its application to law. Could a person be punished for 'fraud' in such a case as that last mentioned, under a statute providing pains or penalties against the maker of a fraudulent conveyance?² Clearly not.³ There is solid ground for a legal distinction between the case of a man who does an act which the common conscience would repudiate as a fraud and one which it would regard as only invalid because contrary, e. g. to public policy. Terms are often deceptive, and their use must be narrowly scrutinized, so that the substance of things concealed by them may be regarded. And it is the more important to set out with this warning in regard to fraud under statutes, for the reason that it will not be practicable to keep constructive fraud separate from real fraud in the following pages.

A remark may here be made in regard to the general definition of fraud already referred to. The law has a dictionary of its own; it may declare an act to be a fraud, or it may, as in the English Bankruptcy Act, 1883, declare that an act

¹ The term 'wrongful' will now be understood, when used, to express the idea of guilt.

² See 13 Eliz. c. 5, § 3; 27 Eliz. c. 4, § 3. Also the modern statutes concerning fraud on the part of debtors. It is

often forgotten that *Twyne's Case*, 3 Coke, 80, was a criminal proceeding, an information for fraud under 13 Eliz.

³ *Hoyt v. Godfrey*, 88 N. Y. 669; *Spies v. Joel*, 1 Duer, 669.

shall 'be deemed fraudulent,'¹ which perhaps might not be deemed fraudulent in the common understanding of the word. And the law may and does amend the meaning of its terms from time to time, as occasion requires, still clinging, and in most cases rightly clinging, to them, however greatly their meaning may have been changed, rather than adopt new ones or simply drop the old ones; the term 'fraud' itself, which has veered in meaning from the extreme of personal dishonor almost, if not all the way, around to negligence, affording ample illustration.² It matters not; there will still be a clear distinction in law as well as in morals between cases in which there is guilt according to the common conscience and cases in which there is not. Cases of the latter kind may be declared 'fraudulent' for some purposes; the same thing as cases of guilt they cannot be.³

¹ § 48.

² In *Peek v. Derry*, 37 Ch. D. 541, some of the judges appear to have almost reached the point of dropping the word 'fraud' as a term of actions for deceit. See p. 568. But even if the doctrine of the Court of Appeal had not been rejected by the House of Lords (14 App. Cas. 337), there would be need to use it on the footing of fraud as involving guilt according to the common conscience. See p. 582. The haziness of the notion of moral fraud (as an element of this action for deceit) arises often, it is believed, from confusing actual belief and the belief of the reasonable or average man. 'Negligence' does not fit the case well; indeed it has not been proposed. But the line is not very clear. *Supra*, p. 6, note.

³ There will no doubt be distinctions too between different cases of real fraud within the definition and explanation; the criminal and the quasi-criminal law may well take notice of the difference between a case of fraud without any actual intention to commit

the wrong (that is, a case where the fraud was such only according to the common conscience), and a case of fraud committed with intent to defraud. See e. g. *Neal v. Clark*, 95 U. S. 709, and *Strang v. Bradner*, 114 U. S. 555, as to discharges in bankruptcy in respect of fraudulent debts under special statutes.

Of a recent transaction, Lord Justice Cotton, making use of familiar language, says: 'It is what is called a fraud upon the bankruptcy law. I do not for one moment suggest that any fraud was intended . . .; but it is a thing not allowed by the general policy of the law to attempt to avoid the provisions of the Bankruptcy Act, and in that sense it is a fraud upon the bankruptcy law. The clause [in a conveyance under consideration] is a fraud upon the bankruptcy law, or an evasion of the bankruptcy law.' *Ex parte Jackson*, 14 Ch. D. 725, 741. See *Siebert v. Spooner*, 1 Mees. & W. 714, 718; *Woodhouse v. Murray*, L. R. 2 Q. B. 634, 638; *Ex parte Foxley*, L. R. 3 Ch. 515. Such a case may or may not be a

It is time now to meet the question, what constitutes circumvention; and yet one may well hesitate before attempting to define a term for the definition of which the law has not brought the materials more closely together than it has for this one. Of deception (the first branch of fraud), though it cannot be said that that has ever entered into the received nomenclature of the law, the state of the law enables one to form a very clear conception;¹ of circumvention, as a whole, the same can only be affirmed with caution. Particular definitions may be given with considerable confidence; no general one can be more than tentative. And it is not to be forgotten that circumvention must cover what of fraud deception does not cover, if fraud itself has been rightly defined.

The true way of reaching a general definition, to be based upon the actual state of the law, is to proceed, where there is doubt, from the particular and known. Taking then the ordinary manifestations, severally, of circumvention, to wit, fraudulent transfers of property, fraudulent payments of debt, and the like, and schemes in general for evading the law, the following is proposed: Circumvention consists (1) in A's disposing of his property or money, or yielding of his rights, in favor of B, with intent to hinder, delay, or defraud C, C being here a creditor of or purchaser from A; (2) in A's wrongful (i. e. unlawful and guilty) disposing of his property or money, or yielding of his rights, in favor of B, a creditor of A, so as to make the claim of B to the benefit thereof apparently superior to the just claim of C, also a creditor of A, to part of such benefit; (3) in A's wrongfully evading process of the law in favor

true fraud (by the common conscience) according to circumstances; if the party knew or had reason to know the real situation, the act would in principle be a true fraud; if he did not, it would only be unlawful. And there may not

have been any actual purpose to commit fraud in the first case any more than in the second.

¹ See the definition of the term near the end of this chapter.

of C; (4) in A's wrongfully evading the law in any other way, against the rights of C, in a matter in which C is not a party.¹ Remarks: 'Creditor' in the first of these cases is used not in strict technical sense, but in the wider sense of one having a legal or equitable demand;² 'disposing' is intended to include all active means of transferring rights, and 'yielding' all passive means, in the way of circumvention; 'property' is used in the widest sense; and 'process' is meant to embrace all steps which the law may authorize for the accomplishment of its objects. The following illustrations may be given of the foregoing phases of the subject:—

1. Of the first one it need only be said that it is the case of fraud under the statutes of Elizabeth, fraud upon creditors or purchasers of the debtor or vendor; though it may be noticed that for one to convey one's property to another with intent to hinder or delay creditors or purchasers is a fraud within what has been said quite as much as to convey with an intent to defraud.³ The only difference is that the latter expression is often used to denote 'moral' fraud.

2. The second phase of the subject is fraudulent preference under acts of bankruptcy or insolvency, a wrong not rec-

¹ If any one will have it that this last phase of the subject is not definition, because 'in any other way' does not define anything, be it so; it is not intended as definition, but as a stepping-stone to one.

² See *Blenkinsopp v. Blenkinsopp*, 1 De G. M. & G. 495; *Bouslough v. Bouslough*, 68 Penn. St. 495; *Livermore v. Boutelle*, 11 Gray, 217; *Janvrin v. Curtis*, 63 N. H. 312; *Janvrin v. Janvrin*, 60 N. H. 169; *Morrison v. Morrison*, 49 N. H. 69; *Turner v. Turner*, 44 Ala. 437; *Metzler v. Metzler*, 99 Ind. 384; *Dugan v. Trisler*, 69 Ind. 553; *Frakes v. Brown*, 2 Blackf. 295; *Boils v. Boils*, 1 Coldw. 284;

Feigley v. Feigley, 7 Md. 537; *Lott v. Kaiser*, 61 Texas, 665; these being cases of conveyances, pending or after divorce proceedings, to defeat an execution for alimony. Such are within 13th El. c. 5. Further, see *Burton v. Mill*, 78 Va. 468; *Manuf. Co. v. Waldron*, 75 Maine, 472; *Welde v. Scotten*, 59 Md. 72; *Scott v. Hartman*, 26 N. J. Eq. 89. The Maine, Maryland, and New Jersey cases were cases of conveyance to defeat actions for tort, and were held to be within the statute. But see *Hill v. Bowman*, 35 Mich. 191, contra. The statute speaks of creditors 'and others.'

³ See *Nicholson v. Leavitt*, 6 N. Y. 510; *Rupe v. Alkire*, 77 Mo. 641.

ognized by the courts apart from the administration of such acts,¹ though in principle a different view of the matter might have been expected. An illustration of this phase may be given in the language substantially of an eminent judge in stating the case before the court. There had been a transfer of property by a debtor to one of his creditors by way of payment of a debt. But the debtor and the creditor, it was said, well knew that the debtor was insolvent; and knowing this, and the law also, they agreed to do the very thing which the legislature had declared to be an act of bankruptcy, but in such a way as to avoid, as they supposed, the debtor's committing such an act. 'I think,' said the learned judge, 'that we ought to hold that such a transaction was a fraudulent transfer.'² Another possible illustration: In consideration of a past debt of a certain sum and a present advance of an amount somewhat less, a trader, insolvent, conveys all his property to a creditor, giving to him the right to seize all after-acquired property of the debtor, though purchased with the money advanced.³ Still another: An owner of a patent sells it, the buyer agreeing to pay to the seller royalties. The

¹ *Burt v. Perkins*, 9 Gray, 817; *Willmott v. London Celluloid Co.*, 34 Ch. D. 147, C. A. If it be said that the definition, in this particular, is a little in advance of the law as it is, it may be said in reply that the law as it is, i. e. the statutes around which and finally by which the doctrine of preference has come into existence, — the law as it is recognizes the principle of the definition, and may be considered a particular expression of it, an example which may yet be afforded by other examples as public policy may permit or demand. It comes to this only, that there is a case of fraud for which the law has not yet thought it best to provide a remedy. See *supra*, p. 7, note.

² *Mellish*, L. J. in *Ex parte Pearson*, L. R. 8 Ch. 667. 'I think it is open to the plaintiffs,' said Lord Chelmsford, in *Howard v. Shrewsbury*, L. R. 2 Ch. 760, 772, 'to show that the transaction, though clothed as a purchase, was of an entirely different description, and that it was only made to assume an appearance to satisfy the letter of the Act of Parliament, while it violated its spirit.'

³ *Graham v. Chapman*, 12 C. B. 85. The debtor, it is said, gets no real equivalent for what he has made over to one of his creditors to the detriment of the rest. But as to this case see *Lomax v. Buxton*, L. R. 6 C. P. 107, 112, 113, 115.

buyer at the same time lends money to the seller, and is to be repaid by retaining half the royalties as they become due, and the *whole* of them in satisfaction of the debt in the event of the seller's bankruptcy before the sum is paid. 'This is a clear attempt to evade the operation of the bankruptcy laws.'¹

3. One of the provisions of the twenty-fifth section of the English Bankruptcy Act, 1883, may be referred to for an illustration of the third phase of the definition. The statute there provides for the arrest of a debtor, if after a bankruptcy notice or a bankruptcy petition by or against him there appears probable reason to believe that the debtor is about to abscond with a view of avoiding payment of the debt, or service of a bankruptcy petition, or appearance to any such petition, or of avoiding examination, or of otherwise avoiding, delaying, or embarrassing bankruptcy proceedings against him.² Another illustration from the use of the old writ 'ne exeat regno,' or the like statutory process: To avoid process for the payment of alimony decreed in favor of a wife in proceedings for divorce, the husband is about to leave the state, and the wife sues out the writ.³ Absconding with a view of avoiding service of process, and concealment of property with like view,⁴ where these acts are wrongful, so as to have legal consequences, are common illustrations.

4. An illustration of the fourth phase: A, a married man domiciled in Massachusetts, goes to Maine, where the divorce laws are different from those of Massachusetts, with a view to obtaining a divorce there for a cause which would not

¹ Ex parte Mackay, 8 Ch. D. 643, James, L. J. See Ex parte Williams, 7 Ch. D. 138, C. A.

² See U. S. Rev. Sts. § 5021, subsec. 2, Bankruptcy Act, 1875. And compare Blennerhassett v. Sherman, 105 U. S. 100, referring to Hungerford v. Earle, 2 Vern. 261; Hildreth v. Sands, 2 Johns. Ch. 35; Scrivenor v. Scrivenor, 7 B. Mon. 374; Bank of U. S.

v. Housman, 6 Paige, 526. See also Coates v. Gerlach, 44 Penn. St. 48.

³ 2 Story's Equity, § 1471. See the Debtors Act, 1869, 32 & 33 Vict. c. 62, § 6.

⁴ Such an act is in many states made a ground for attaching property; as e. g. in Missouri. R. S. 1879, § 398; Bullene v. Smith, 73 Mo. 151. See also Taylor v. Kuhuke, 26 Kans. 132.

authorize a divorce in Massachusetts ; and, without remaining in Maine long enough to acquire a legal domicile there, obtains a divorce for such cause in that state, and then returns to the state of his domicile.¹ Again : A man is arrested on Sunday, on a pretended charge of crime, with a view to holding him until Monday and then arresting him on civil process, which is done.² Again : Property is given to a man upon the terms that it shall not be liable for his debts.³

It will be noticed that the constant factor in the definition, and in all the illustrations of it, is evasion of law.⁴ It is believed that this is the radical idea of circumvention, and that if there is any form of fraud which does not contain it, that form will be found to be some kind of deception, as touching motives. Not all evasion of law however is fraudulent in any significant legal sense, since sometimes acts of the kind are not followed by any legal consequences ; they fall without the notice of the law ; they are not unlawful. A man may set up a rum-shop just outside the corporate limits of a town in which the sale of liquor is forbidden by law ; a man may evade the marriage laws of his state, if there is no law against his doing so ;⁵ the mere evasion will not make him guilty of fraud before the law. Nay, a legislature may set

¹ Sewall v. Sewall, 122 Mass. 156 ;
Van Fossen v. State, 37 Ohio St. 317.

'When a person domiciled in this state goes, in evasion and fraud of the law of his domicile, into another state, in order to obtain a divorce there for a cause which . . . would not authorize a divorce by our law, it is within the power of the state, by its courts or its legislature, to declare or enact that a divorce, so obtained before acquiring a domicile in the other state, is or shall be of no force or effect in this state.' Gray, C. J. in Sewall v. Sewall, *supra*.

² See Halsey v. Nichols, 12 Pick. 270, 275 ; vol. 1, p. 6.

³ Brandon v. Robinson, 18 Ves. 428. But see Nichols v. Eaton, 91 U. S. 716. This is holding a man out in false colors ; argument to the contrary has to be strained. Upon this subject see 'spendthrift trusts,' *post*, pp. 222, 223.

⁴ Generally under color of the forms of law ; but not always, as see some of the illustrations under the third phase.

⁵ See Putnam v. Putnam, 8 Pick. 433 ; Medway v. Needham, 16 Mass. 157 ; *post*, p. 28.

before the world a conspicuous example of immorality, and evade and circumvent, it seems, the solemn provisions of the Constitution itself.¹ The evasion must in itself be wrongful. And between man and man it must be an interference with actual rights, to be fraudulent, legally speaking, as has been intimated all along.² A man may not e. g. dispose of his property by will contrary to certain laws of descent and distribution, but an attempt to do so, not touching dower or the like statutory rights, would not ordinarily involve fraud, because it could not interfere with rights;³ assuming that the property is the testator's absolutely, there are no rights except the widow's to be interfered with. For the same reason a man's conveyance in fraud of creditors is no fraud upon his wife or children.⁴

On the other hand, every wrongful evasion of law, touching rights, is conceived to be a fraud, and every such evasion practised against one not a party to the act is a fraud by circumvention. That this latter kind of evasion is true fraud, and not constructive, is clear. It is a kind of deception, though it is not deception touching anybody's motives; that is, it is not practised upon a party to the transaction, and it

¹ Bryce, *American Commonwealth*, vol. 1, pp. 529-531.

² *Redhead v. Westwood*, 59 L. T. Rep. 298; *Haydon v. Brown*, ib. 330; cases of evasion of the (English) Bills of Sale Act. See 5 *Law Quarterly Review*, 106, 107; *Pringle v. Pringle*, 59 Penn. St. 281. But see such cases as *Huey's Appeal*, 29 Penn. St. 219, and *Emerson v. Smith*, 52 Penn. St. 90, under exemption laws. Contra, *Marshall v. Sears*, 79 Va. 49; and see the chapter on Construction of the Statute (of 13th Eliz.).

In some states it is held that a creditor cannot have a fraudulent conveyance of his debtor set aside without showing that the debtor did not have sufficient

property left to pay all his debts. *Sherman v. Hogland*, 54 Ind. 578; *Evans v. Hamilton*, 56 Ind. 34; *Bentley v. Dunkle*, 57 Ind. 374; *Deutsch v. Korsmeier*, 59 Ind. 373; *Evans v. Nealia*, 69 Ind. 148; *Wiley v. Bradley*, 67 Ind. 560; *Pfeifer v. Snyder*, 72 Ind. 78; *Bruker v. Kelsey*, ib. 51; *Cox v. Hunter*, 79 Ind. 590; *Napper v. Yager*, 79 Ky. 241; *Lewis v. Lamphere*, 79 Ill. 187; *Taylor v. Robinson*, 7 Allen, 253. But see post, pp. 80, 137, 393.

³ *Comp. Fay v. Winchester*, 4 Met. 513.

⁴ *Pringle v. Pringle*, 59 Penn. St. 281; *Bonslough v. Bonslough*, 68 Penn. St. 495; *Wall v. Provident Inst.* 3 Allen, 96; s. c. 6 Allen, 320.

may be perfectly open.¹ In all except portions of the third phase, evasion of law is simulating one thing while doing, or endeavoring to do, another. ‘*Aliud simulatur, aliud agitur;*’² it is professing to conform to the law, while endeavoring to avoid it. Even the case of eluding the sheriff, under the third phase, is very like this; it is evading the law’s process by concealment, and so by deception; though it is not deception touching the motives to any transaction between the wrongdoer and the party wronged, and so does not belong to the first branch of fraud.

Assuming all this to be correct, the following may now be offered as a general definition of the term in question: Fraudulent circumvention consists in endeavor to alter rights by wrongfully evading the law in a matter in which the person to be wronged is not a party. Remarks: 1. The law may be evaded either by circuitous means, as where A conveys his property to B with intent to defraud his creditor C; or directly, as where A wrongfully conceals his property with like intent. There is then nothing in the literal meaning of the word ‘circumvention.’ 2. The word ‘person’ includes all beings capable of rights; citizens, partnerships, bodies corporate and politic, the state.

Whatever falls under the definition is real fraud;³ whatever falls short, and yet may for some purposes require to be considered as in the same case, is, properly speaking, constructive fraud, or, to coin a term, constructive circumvention. It will not be found practicable, as has already been intimated, to observe this distinction by specific division of the subject; and whether a case of possible fraud in the new form is actual or constructive must be left to be determined, when necessary, by squaring it with the considerations above set forth, so far as they are accurate.

¹ Vol. 1, p. 15; *Gragg v. Martin*, 12 Allen, 498.

² As to the case of preference, see *supra*, p. 7, note.

³ Dig. 4, 3, 1, 2; vol. 1, p. 4, note.

Let us now, at the risk of a little repetition, have the conclusion of the whole matter of defining fraud : Fraud consists in endeavor to alter rights by deception touching motives, or by circumvention not touching motives. Deception here consists in endeavor to alter rights by creating wrongfully a false impression upon one's mind in a matter in which the one deceived is a party with the wrongdoer.¹ Circumvention here consists in endeavor to alter rights by wrongfully evading the law in a matter in which the person to be wronged is not a party.²

The last-named subject will be considered under the heads : I. Evasion of Law under the Statutes of Elizabeth. II. Evasion of Law by Preference : Bankruptcy Laws. III. Evasion of Process. IV. Evasion of Law in other Ways. Throughout it will be necessary to ascertain what constitutes the guilt, that is, the peculiar wrongfulness, of the act in question, — in a word, what makes an act a fraud in the way of circumvention. In this, it is believed, will be found the justification of what has been said in regard to the standard or test of the law. But there are some preliminary subjects.

¹ There is just a suspicion of danger in speaking of the one deceived as 'a party with the wrongdoer,' or the like, — of conveying the idea of joint wrongdoing between the two ; but it is difficult to make the matter better without a circumlocution.

² In trying to cut a path through the wilderness, the criminal law of

fraud has been left aside. The writer's acquaintance with criminal law is not such as to justify him in laying open that domain. Perhaps another will do it. Meanwhile however it is apprehended that bribery is bribery, and embezzlement embezzlement (et sic de aliis), and not fraud ; or if fraud, then fraud and something else.

I. EVASION OF LAW UNDER THE STATUTES OF ELIZABETH.

CHAPTER II.

FRAUDULENT CONVEYANCES AT COMMON LAW.

THE subject for consideration in the earlier portion of this volume is fraud under the statutes of Elizabeth, and the corresponding statutes in this country, passed in aid of creditors and purchasers; the earlier of the statutes of Elizabeth¹ having been passed for the relief of creditors, the later² for the relief of purchasers. But there is a preliminary question not without interest. It has sometimes happened that a case touching rights under a transaction in the nature of a fraudulent conveyance has come before the courts, which fell without the terms of these statutes;³ and this has raised the question whether there is any authority of law for giving relief or redress to the party making complaint of the transaction.

The answer has generally if not always been in the affirmative,⁴ though in most cases it has been in the way of a mere

¹ 13 Eliz. c. 5.

² 27 Eliz. c. 4.

³ See e. g. *Blennerhassett v. Sherman*, 105 U. S. 100, of a fraudulent concealment of a mortgage, to enable the mortgagor to get credit. The mortgage was declared 'fraudulent and void at common law.' There were also misrepresentations by the mortgagee; and the case more properly belongs to the subject of misrepresentation.

⁴ *Twyne's Case*, 8 Coke, 80, 83, citing *Upton v. Bassett*, 37 Eliz.; Coke, Litt. 76, 290 b; *Ryall v. Rolle*, 1 Atk. 165, Lee, C. J.; *Cadogan v. Kennett*, 2 Cowp. 432; *Barton v. Vanheythuyssen*, 11 Hare, 126, 132; *Herrick v. Attwood*, 2 De G. & J. 21; *Rickards v. Attorney-General*, 12 Clark & F. 80; 4 Kent, Com. 462, 463; *Hamilton v. Russel*, 1 Cranch, 309; *Hudnal v.*

dictum, repeating without consideration what had been said by Sir Edward Coke¹ or Lord Mansfield.² The language most frequently used is that the statutes of Elizabeth are only 'declaratory of the common law,'³ though Lord Mansfield, followed by others, has put the matter in a somewhat different way. His lordship said that 'the principles and rules of the common law as *now* universally known and understood are so strong against fraud in every shape that the common law would have attained every end proposed by the' two statutes of Elizabeth.⁴ Still another suggestion may be drawn from a rule of law running back to very early times, that statutes aimed against fraud should be liberally interpreted,⁵ and that cases of fraud falling without the letter of the statute may be within its equity,⁶ or spirit. These suggestions, as furnishing a ground

Wilder, 4 McCord, 294; Peck v. Land, 2 Kelly, 1; Clements v. Moore, 6 Wall. 299; Gary v. Jacobson, 56 Miss. 204; Edmonson v. Meacham, 50 Miss. 34. The last case is a striking illustration. *Infra*, p. 27.

¹ In notes to Twyne's Case, *ut supra*.

² In Cadogan v. Kennett, *supra*.

³ Upton v. Basset, 3 Coke, 80, 83; Coke, Litt. 76, 290 b; Ryall v. Rolle, 1 Atk. 165, Lee, C. J.; Herrick v. Attwood, 2 De G. & J. 21; Hamilton v. Russel, 1 Cranch, 310, 316; Hudnal v. Wilder, 4 McCord, 294. Coke here lays stress upon the use of the word 'declare' ('Be it therefore *declared*, ordained, and enacted') in the statute of 13th Elizabeth. 3 Coke, 83; Coke, Litt. 76, 270 b. But that seems rather far-fetched.

⁴ Cadogan v. Kennett, 2 Cowp. 432, 434; Clements v. Moore, 6 Wall. 299, 312; Peck v. Land, 2 Kelly, 1, 10 ('The statute of Elizabeth goes no further than the common law as *now* understood').

⁵ Twyne's Case, *ut supra*.

⁶ Wimbish v. Tailbois, Plowd. 38, 59. Montague, C. J.: 'If the case

here was out of the words, yet it should be within the equity, of the statute. For it is to be considered that the statute was made for the redress of false covin, and to give a speedier remedy to right. And all such statutes are in advancement of justice, and beneficial to the public weal, and therefore shall be extended by equity.' By 'equity' here is not meant the law of the Court of Chancery, but natural justice or the spirit of the law. The case was trespass.

An example of the action of the courts towards fraud, in what was considered as in aid of the statute, may be seen in cases in which an *exception* of fraud has been engrafted upon a statute; as in the case of the fraudulent concealment of a cause of action. *Ante*, vol. 1, pp. 24-26. But perhaps the most striking instance of the kind is found in the rule of part performance in regard to oral contracts for the sale of land. That rule is in the teeth of the Statute of Frauds; but it appeared to the judges, with good reason, to be necessary, in order to prevent wrong-

for dealing with fraud not directly within any statute, are worthy of special notice.

The last case referred to was before the reign of Elizabeth, and points to the existence therefore of earlier statutes relating to fraud. And indeed there were many such, of varying extent and purpose. A provision of Magna Charta may be looked upon as a starting-point. The thirty-second article (or 'chapter') provided that no freeman should henceforth give or sell any more of his land but so that of the residue the lord of the fee might have the service due to him as belonging to the fee. It is obvious that the tenant, if not restrained by law, could by craft or circumvention convey away, and take the value of, the fee and defraud the lord of his dues. Here is a plain recognition of the principle of the first of the statutes of Elizabeth. The same may probably be said of the article against conveyances in mortmain,¹ and also of the Statute of Quia Emptores.² None of these statutes however speaks in terms of fraud.

The earliest statute worthy of particular notice, which deals directly with fraudulent conveyances, is of the year 1376-7,³ that is, about two centuries before the statutes of Elizabeth. In that statute, which is in Anglo-French, the Commons pray that whereas divers persons, as well heirs of tenements as others, borrow money or goods of many people of the kingdom, and then give all their tenements and chattels to their friends,⁴ by collusion of having the profits thereof at their

doers from turning the very law itself to their protection. Ante, vol. 1, p. 445. Still it is a very dangerous thing for the courts to tack an exception to a statute the language of which does not suggest it, even when that exception relates to fraud. See vol. 1, pp. 24-26, in regard to concealment of a cause of action; and see post, ch. 4, § 2, in regard to exemption laws.

¹ Magna Charta, c. 36. See 15 Rich. 2, c. 5 (1391); Digby, Hist. Real Prop.

256; a statute of mortmain directed against craft ('sotile ymagination et par art et engyn') in terms.

² 18 Edw. 1, c. 1 (1290).

³ 50 Edw. 3; 2 Rot. Parl. p. 369, No. 51. The statute being an unfamiliar one, it is given in full. So of the next one.

⁴ Comp. Dodd v. Browning, 1 Calendars in Ch. p. xiii (temp. Hen. 5); William of Arundel v. Berkeley, ib. p. xxxv (temp. Hen. 6). In these cases

pleasure, and then betake themselves to Westminster, St. Martin, or other privileged places, and there live in great state ('contenance') on other goods, in manner aforesaid, so that their creditors shall be greatly put to it to get a small part of their debts, on releasing the rest; and then the debtors return to their houses, and have back their tenements, goods, and chattels at their pleasure by assent of their said friends; and by reason of such frauds and collusions many persons of the kingdom are very sorely grieved, and some entirely destroyed; therefore the Commons pray remedy by a writ of debt against such occupiers of such tenements and chattels, or other suitable remedy. In answer the king wills that if it shall be found that such feoffments were made by collusion, the creditors shall have execution on the said lands as before, as if no such feoffments had been made.

A statute of similar type, of the reign of Henry the Seventh,¹ follows, after an interval of a century and more, by which time statutes had come to assume a more familiar and formal style. This one recites, in English, that where(as) oftentimes deeds of gift of goods and chattels have been made to the intent to defraud creditors of their duties,² and the person that maketh the said deeds goeth to sanctuary or other places privileged, and occupieth and liveth with the said goods and chattels, their creditors being unpaid, it is ordained³ that all deeds of gift of goods and chattels, made or to be made of trust, to the use of that person that made the same deeds, be void and of none effect.

This statute, it will be noticed, appears to supplement the one first given; that one, notwithstanding the language of

the donees refused, in the one case to give up the lands, in the other to perform the trusts, and the suits are to compel them. The cases are reprinted in Digby, *Hist. Real Prop.* 269.

¹ 3 Hen. 7, c. 4 (1487-8).

² Used in the old law for debts.

³ 'It is ordained, enacted, and established, by the assent of the lords spiritual and temporal, and at the request of the Commons, in the said Parliament assembled, and by authority of the same;' quoted here in contrast with the language of the earlier statute.

the prayer, relating only to conveyances of land. This second statute too brings into prominence what is but matter of inference before, to wit, that trusts were obnoxious as being fraudulent devices for avoiding 'duties;' and from this time on, until modern times, trusts are looked upon by the courts of law as a convenient cover for fraud. The fact is brought out again in the next reign, in the famous Statute of Uses.¹ The statute begins by reciting that lands, tenements, and hereditaments ought not to be transferred but by solemn livery, etc., without covin or fraud, yet divers and sundry imaginations, subtle inventions, and practices have been used, whereby hereditaments have been conveyed by fraudulent feoffments, fines, recoveries and other assurances made to secret uses, intents, and trusts, etc., by occasion of which fraudulent feoffments, confidences, and trusts, divers and many heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids for making the eldest son a knight and for marriage of daughters, and scanty any person can be certainly assured of any lands by them *purchased*, nor know surely against whom they shall use their actions or executions for their rights, titles, and duties, etc. Therefore it was enacted that he who had the use in lands conveyed should henceforth stand and be seised thereof; an enactment at once evaded by the technical trusts of modern times, which, it need hardly be said, have escaped the opprobrium of the earlier uses.

From this time on the trusts that fall under the condemnation of the law (for the courts continued to reprobate trusts as much as ever) are the untechnical trusts, generally speaking, arising from the retention of possession, or the secret reservation of benefits, by a vendor of property conveyed, to outward appearance, absolutely. 'Here was a trust between

¹ 27 Hen. 8, c. 10 (1535). For earlier legislation of the kind, see 1 Rich. 2, c. 9; 7 Rich. 2, c. 12; 15 Rich. 2, c. 5, Mortmain Act.

the parties,' it was said in the leading and most famous modern case,¹ 'for the donor possessed all and used the goods as his own, and fraud is always apparelled and clad with a trust; and a trust is a cover of fraud.'²

All this, and more, by way of statute and statutory intimation before the Elizabethan legislation. But the existence of the earlier laws began to fade from memory in an age when letters were not greatly cultivated; the fact itself in course of time turned to a tradition; and tradition soon forgot its ground. So it seems; and this, in connection perhaps with the old unwritten law of deceit,³ is probably the foundation of the modern belief that the statutes of Elizabeth were only declaratory of the common law. Indeed in this country familiar English statutes passed before the separation are in some cases spoken of as part of our common law.⁴

It is easy then to see how the earlier of the two statutes of Elizabeth, relating to creditors, might be considered as little if anything more than a stringent, though not exhaustive, declaration of the old law as being common law; and also to see how belief should come to be acted upon, as it has been, as founded upon fact. In regard to the later of the two Elizabethan statutes relating to purchasers, the case

¹ Twyne's Case, 3 Coke, 80.

² It was resolved in this case that though there was a true debt to Twyne (against whom Coke, Attorney-General, had filed an information for fraud) and a good consideration, yet it was not within the proviso of the statute because it was not bona fide, 'for no gift shall be deemed to be bona fide within the said proviso which is accompanied with a trust; as if a man be indebted to five persons in the several sums of £20, and hath goods of the value of £20, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them

that the donee shall deal favorably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able; this shall not be called bona fide within the said proviso, for the proviso saith on a good consideration and bona fide.'

³ The old writ, and the defence, of deceit; but that is a different thing.

⁴ The statutes of Elizabeth themselves have been so treated in some States, as in New Hampshire, and in Massachusetts.

is different. There is indeed the suggestion of the latter part of the extract above made from the Statute of Uses, — ‘scantly any person can be certainly assured of any lands by them purchased,’ — but the only remedy given is annexing the seisin to the use; and there is silence in the other legislation. But doubt is removed by a case already cited,¹ which was decided but ten years after the passage of the statute in question, and fell without the same. The Common Pleas in that case adjudged that if a man makes a lease for years by fraud and covin, and afterwards makes another lease bona fide, but without fine or rent reserved, the second lessee should not avoid the first lease; ‘for it was agreed that by the common law an estate made by fraud should be avoided only by him who had a former right, title, debt, or demand.’² And to make the matter still plainer, the court adds that even he who hath right, title, interest, debt, or demand more puisne (later) shall not avoid a gift or estate precedent by fraud by the common law.³

From this it appears that there was neither statute to which the rule of liberal interpretation could be applied, nor common law, to reach the case of a purchaser having no precedent right, title, interest, debt, or demand; and what has been said shows also how far, and in what sense, it is true that the legislation of Elizabeth was ‘declaratory of the common law.’ Were it not for the intimation of Lord Mansfield, or for the fact behind that intimation, the expansiveness of the common law, the conclusion could scarcely be doubtful, — the common law took care of the rights of creditors; for purchasers it had no help. But a hundred years ago Lord Mansfield, in some respects a hundred years ahead of his time, thought that the principles of the common law as then understood were such towards fraud as to have enabled

¹ *Upton v. Basset*, stated in 3 Coke, 83.

² See *Penniman v. Cole*, 8 Met. 496, 499.

³ On authority of 22 Ass. 72.

it to attain every end proposed by the two statutes of Elizabeth;¹ and if that was a somewhat sanguine statement, it was a very good prophecy, assuming that the later growth of the common law generally is fair evidence of what would have proved to be its expansiveness in dealing with the kind of fraud under consideration.

It is not necessary to take Lord Mansfield narrowly. By the 'common law' he probably did not mean the law administered in the courts of law alone and unaided, though he was ever drawing equity that way. The common law as a whole, whether administered by courts of law or of equity, would meet the demands of society,—that was probably his lordship's meaning; if not, the statement was too wide even as a prophecy. Modern equity in the technical sense has certainly had its share in establishing a common-law doctrine in regard to fraudulent conveyances, and that in cases beyond the reach of jurisdiction at law in any view.

One or two illustrations may be given: A man named Attwood² executed a voluntary mortgage to his sisters to secure a past debt, and was allowed to retain the title deeds to enable him to give a first mortgage to a creditor who was pressing him with suit. Attwood deposited the deeds with this creditor, but afterwards, without the creditor's concurrence, obtained them again, and with them made a mortgage to the plaintiff, without notice, for a sum larger than the amount due to the sisters. On a question of priority it was held that the sisters must be postponed to the plaintiff. The case fell without the statute of 27th Elizabeth, unless the theory of the 'equity of the statute' could be invoked. This the court was inclined to apply; but Lord Cranworth declared that if the case did not fall within the statute at all, so that the sisters could not maintain ejectment for want of a legal title, that would not affect the case. The jurisdiction of equity

¹ Cadogan v. Kennett, 2 Cowp. 432, 434.

² Herrick v. Attwood, 2 De G. & J. 21.

had existed prior to the statute, and had not been taken away by it; the statute had only given a clearer and more extended remedy. Again it is held in some states that where a debtor in fraud of his creditors pays for property, and procures the title to be made to another, the transaction is not within the statute of 13th Elizabeth,¹ but that equity will treat the transaction as invalid on common-law grounds.²

Nor have the courts of law in like recent times stopped with asserting the common-law jurisdiction; they too have acted upon the assertion, and this both in England and in America.³ In the first case cited an information had been filed on behalf of the Crown, praying the benefit of a judgment of outlawry and that a certain deed by the outlaw might be set aside as fraudulent and void against the Crown. This was a matter clearly without the statutory law; but the jurisdiction was sustained as being founded upon the common law.

Thus stands the case on the question proposed at the beginning of this chapter. It is believed that upon this evidence one cannot go far wrong in asserting that where statute, liberally interpreted, fails, a remedy still exists by the common law 'as now understood,' in the language of Lord Mansfield, whether by a suit at law or in equity, for every case of 'endeavor to alter rights by wrongfully evading the law in a matter in which the person to be wronged is not a party.' And that may have some special significance for the newer states of the Union, and for the territories, and for yet newer and remoter lands in which the English-speaking race is planting itself, where legislation may be wanting or imperfect; for it is to be remembered that the 'expansiveness of the common law' means not only growth from a germ, but

¹ Edmonson v. Meacham, 50 Miss. 34; Crozier v. Young, 3 Mon. 157; ferring to Lamplugh v. Lamplugh, 1 P. Wms. 111.

Gowing v. Rich, 1 Ired. 553. Sed quære. See post, pp. 123-127.

² See e. g. Rickards v. Attorney-General, 12 Clark & F. 30; Hudnal v.

³ Edmonson v. Meacham, supra, re- Wilder, 4 McCord, 294.

adaptability of the growing principle to new surroundings and to new systems of government. America has attested this on a scale large enough.¹

But it is necessary to guard against being led astray by a phrase. The common law is indeed expansive; but it is expansive only upon right lines, that is, only upon certain lines of principle or of public policy. It will not do to say that the courts will always provide a remedy for fraudulent conduct. A right under the law must have been invaded; and it would be entirely contrary to the course of the action of the courts to say that because certain conduct was of a fraudulent nature, the common law might be expanded so as to reach it. In other words the courts do not affirm a right *ex post facto*, which there was no good reason to suppose was already in existence; or, if this will make the point clearer, the courts will not declare the existence of a law against a particular act of a fraudulent nature merely because that act has been committed. If there is no reason for saying that a right or a law existed which has been infringed, the courts generally leave it to the legislature to create the right or the law.

There may then be cases of fraud, or rather cases in which all the elements of fraud may be found except the pre-existence of a law or right (it matters not here which it may be called), with which the courts, in accordance with immemorial practice and with sound views of political economy, may not deal. The books furnish some striking illustrations. A famous case² in Massachusetts may be referred to. The town of Medway brought *assumpsit* against the town of Needham for expenses incurred in the support of C and his wife, paupers, alleged to have their legal settlement in Needham. The

¹ The common law may contract too, found necessary to contract the law of as well as expand, when necessary; and fraud.

America has attested this also. But it ² *Medway v. Needham*, 16 Mass. is hardly probable that it will ever be 157.

case turned upon the validity of the marriage of the paupers. At the time of the supposed marriage they were inhabitants of Massachusetts Bay ; but the law of the province prohibiting their marriage (the man being a mulatto and the woman white), they went into the neighboring province of Rhode Island, the laws of which did not prohibit the marriage, and were there duly married, and then returned to Massachusetts. It was now objected by the defendants that the marriage was void ;¹ but the court ruled the contrary.

The principle, as the court declared, was that a marriage good in the country in which it was entered into, was good everywhere ; and it made no difference that the parties had gone elsewhere to evade the laws of their own country. It was not so with regard to the law of contracts generally ; but the law relating to marriage stood upon exceptional grounds of policy. The meaning of this clearly is, that with regard to contracts generally, laws already existed, whether by acts of the legislature or decisions of the court, making the evasion of the local law itself unlawful, whereas there existed (at the time) no law making the particular evasion unlawful ; and the courts would not undertake to make it so, especially after the act. And the case itself had its exceptions, which further illustrate the principle under consideration. Thus it was said that if the marriage had been incestuous, then the fact that it may have been valid where made might make a different case, when 'the parties' return to live in defiance of the religion and *laws* of their country.'²

¹ Such marriages in Massachusetts were not merely prohibited ; they were declared by statute to be void. St. 1786, c. 3, § 7. to marriage, Pub. Sts. Mass. c. 145, §§ 4, 10, from Rev. Sts. c. 75, § 6 ; Commonwealth v. Lane, 113 Mass. 458 ; Commonwealth v. Richardson,

² See also Putnam v. Putnam, 8 Pick. 433. Statute has since made acts done to evade the laws of marriage and divorce unlawful. See as 126 Mass. 34 ; as to divorce, Sewall v. Sewall, 122 Mass. 156 ; Smith v. Smith, 13 Gray, 207 ; Van Fossen v. State, 37 Ohio St. 317 ; ante, p. 15.

CHAPTER III.

THE STATUTE OF 13TH ELIZABETH: AMERICAN
LEGISLATION.

THE statute of 13th Elizabeth, chapter 5, is as follows:—

§ 1. For the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

§ 2. Be it therefore declared, ordained, and enacted by the authority of this present Parliament, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods, and chattels, or any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution, at

any time had or made sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared or expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall, or might be in any ways disturbed, hindered, delayed, or defrauded), to be clearly and utterly void, frustrate, and of none effect; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary, notwithstanding.

§ 3. And be it further enacted by the authority aforesaid, that all and every the parties to such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, and being privy and knowing of the same, or any of them, which after the tenth day of June next coming shall wittingly put in use, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had, or made, bona fide and upon good consideration; or shall alien or assign any the lands, tenements, goods, leases, or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits of or out of the same; and the whole value of the said goods and chattels; and also so much money as are or shall be contained in any such covinous and feigned bond, the one moiety whereof to be to the Queen's Majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases,

rents, commons, profits, charges, and other things aforesaid, to be recovered in any of the Queen's courts of record, by action of debt, bill, plaint, or information, wherein no essoin, protection, or wager of law shall be admitted to the defendant or defendants; and also, being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprise.

§ 4. Provided always, and be it further enacted by the authority aforesaid, that whereas sundry common recoveries of lands, tenements, and hereditaments have heretofore been had and hereafter may be had against tenant in tail, or other tenant of the freehold, the reversion or remainder, or the right of reversion or remainder, then being in any other person or persons, that every such common recovery heretofore had, or hereafter to be had, of any lands, tenements, or hereditaments, shall as touching such person or persons which then had any remainder or reversion, or right of remainder or reversion, and against the heirs of every of them, stand, remain, and be of such like force and effect, and of none other, as the same should have been, if this act had never been had ne made.

§ 5. Provided always, and be it further enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend to make void any estate or conveyance, by reason whereof any person or persons shall use any voucher in any writ of formedon now depending or hereafter to be depending, but that all and every such vouchers in any writ of formedon shall stand and be in like force and effect, as if this act had never been had ne made; any thing before in this act contained to the contrary, notwithstanding.

§ 6. Provided also, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels,

had, made, conveyed, or assured, or hereafter to be made, conveyed, or assured, which estate or interest is or shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid; any thing before mentioned to the contrary hereof, notwithstanding.

§ 7. This Act to endure unto the end of the first session of the next Parliament.¹

The essential feature of this statute, that is, the invalidity of alienations by debtors with intent to hinder, delay, or defraud their creditors, reappears in the law of every state in the Union. In some of the older states, as in Massachusetts, New Hampshire, and Maine,² this feature of the statute, if not the whole statute, has been adopted as part of the common law of the state; indeed in all the original states this was at first probably true, though special legislation has generally taken its place.³ In Pennsylvania the first and second sections of the statute are enacted into law *ipsisssimis verbis*, even to the words 'heriots, mortuaries, and reliefs.' The third and fourth sections are then omitted, and the fifth adopted from the words of the second line, 'this act.'⁴

The first section of the statute of North Carolina follows the lines of the statute of Elizabeth in its first two sections, omitting words unnecessary or inappropriate there, and adding, as in some other states, the word 'disturbed' to 'hindered, delayed or defrauded.' The second section of the North Carolina statute, again as in other states, is an enactment of the substantial part of the statute of 27th Elizabeth;

¹ Statute confirmed, 14 Eliz. c. 11, § 10; made perpetual, 29 Eliz. c. 5, §§ 1, 2. Sections 5 and 7 repealed, 26 & 27 Vict. c. 125.

² Robinson v. Holt, 39 N. H. 557; Manuf. Co. v. Waldron, 75 Me. 472.

³ In many states the statute is part of a general Statute of Frauds, and is often designated by that name.

⁴ 2 Purdon's Dig. App. p. 1486.

while the rest of the statute, in common with legislation of most of the states, departs from the lines of the English legislation, and enacts the effect of judicial construction of the same.¹

The statute of South Carolina begins with the enacting section of the statute of Elizabeth, and follows the same verbatim, only omitting unnecessary or inappropriate words. It then proceeds upon lines of its own, embracing inter alia the effect of 27th Elizabeth.² The statute of Rhode Island consists of a single section, which follows the language of the enacting section of the English statute with unimportant omissions.³ The same may be said of the first section of the statute of Tennessee;⁴ which thereafter follows different lines. The same is true of the first half of the first section of the statute of Texas;⁵ the same is true of the first section of the statutes of Mississippi⁶ and of Florida,⁷ down to the proviso; so of the second section of the statute of New Jersey.

The entire statute of 13th Elizabeth has never been copied in this country; the foregoing are the only statutes which actually copy the language of the whole of the second section. In other states than those just mentioned the statutes, while leading to the same end, pursue different lines, and frequently contain special and distinctive provisions. The legislation of New York, of the year 1829, has furnished the pattern for the statutes of many of the newer states, though not for all of them; and there is much legislation which does not appear to have been copied, or even taken, from any pattern. The statute of New York, corresponding to the 13th Elizabeth, is as follows:—

§ 1. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and

¹ Battle's Revisal, c. 50.

² R. S. 1873, c. 82.

³ G. S. 1872, c. 162.

⁴ Code 1858, § 1759.

⁵ Paschal's Dig. art. 3876, p. 650, 3d ed.

⁶ Rev. Code 1871, § 2893.

⁷ Laws 1872, c. 27.

every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded, shall be void.

§ 3. Every conveyance, charge, instrument, or proceeding declared to be void, by the provisions of this chapter, as against creditors or purchasers, shall be equally void against the heirs, successors, personal representatives, or assignees of such creditors or purchasers.

§ 4. The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration.

§ 5. The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

§ 6. The term 'lands' as used in this chapter shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent, in lands, as above defined.

§ 7. The term 'conveyance' as used in this chapter shall be construed to embrace every instrument in writing (except a last will and testament), whatever may be its form and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered.¹

¹ R. S. Part II. c. 7, title 3.

The foregoing provisions are immediately preceded by a title which contains the following:—

§ 1. All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person.

§ 5. Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers.

§ 6. The term ‘creditors,’ as used in the last section, shall be construed to include all persons who shall be creditors of the vendor or assignor at any time whilst such goods and chattels shall remain in his possession or under his control.

§ 7. Nothing contained in the two last sections shall be construed to apply to contracts of bottomry or respondentia, nor to assignments or hypothecations of vessels or goods at sea or in foreign ports.

Two statutes of New York, of later date, may be mentioned. The first provides in effect that mortgages of goods not accompanied by immediate delivery and followed by actual and continued change of possession shall be absolutely void against the creditors of the mortgagor, and against sub-

sequent purchasers and mortgagees in good faith, unless the mortgage or a copy of it shall be filed as directed by law.¹ The second statute provides, in its first section, that executors, administrators, receivers, assignees, or other trustees of an estate or of the property of a corporation, partnership, or individual, may, for the benefit of creditors or others interested, disaffirm and treat as void all acts done, transfers and agreements made in fraud of the rights of any creditor including themselves and others interested; and in its second section, that such executors, etc. shall have actions against persons who, in fraud of the rights of creditors and others, have received, taken, or in any manner interfered with the estate or property so held.²

Representing the first of the foregoing statutes, with its several sections, by A, the second by B, the third by C, and the fourth by D, for convenience, we may observe: A has been copied entire in Colorado, Oregon, and Wisconsin; all of it except section 6 in Michigan (in substance) and Minnesota; all of it except section 3 in Nebraska; while section 4 only is copied in Indiana. B has been copied entire, with slight changes in section 7, in Michigan, Minnesota, and Nebraska; section 1 has further been copied in Alabama, Colorado, Indiana, Oregon, and Wisconsin, and with slight changes in Arkansas, Missouri, New Jersey, and Ohio; section 5 has further been copied in Colorado down to and including the words 'and this presumption shall be conclusive,' where the Colorado statute stops, and it has been copied in Indiana with the omission of cases of assignment, and again with some changes in Missouri; section 6 has further been copied in Colorado and Indiana; section 7 appears in California among other provisions. C has been copied entire in Nebraska, in Michigan with some additions, and in Indiana and Wisconsin with some changes. D is of too recent date to have made its way as yet into the legislation of other states.

¹ Laws 1833, c. 279.

² Laws 1858, c. 314.

The statutes generally agree in excepting from their condemnation purchase for value without notice; sometimes, as in Tennessee, they provide that conveyances of goods and chattels not upon valuable consideration are to be deemed fraudulent unless they are by will proved and recorded or by deed acknowledged or proved and registered according to law, or unless possession remain with the donee; sometimes on the other hand, as in Minnesota, they provide that no conveyance or charge shall be adjudged fraudulent against creditors solely on the ground that it was not founded upon valuable consideration; sometimes, as in Virginia, a distinction is made between existing and subsequent creditors, to the disadvantage of the latter, as by declaring that though a conveyance be deemed to be void against existing creditors because it is voluntary, it shall not, for that cause, be decreed to be void against subsequent creditors or purchasers; sometimes, as in Kentucky, there is a provision that, in cases of pretended loans of personalty, if possession has remained for five years without demand made and pursued by due process of law, the absolute right shall be deemed to be with the possession, in favor of a purchaser without notice or of any creditor of the person in possession, unless the written evidence of the loan is duly recorded.¹

The foregoing remarks will serve to give a general view of the legislation in a considerable number of the states. To go much further would be difficult without presenting the rest of the statutes at length, so various are they both in form and in substance. In some of the states however the subject is dismissed with very short and simple statutes. The statute of Connecticut may be given as an example, especially as it contains the unusual instance of a provision, like that of the statute of Elizabeth, for a forfeiture. It is as follows:

¹ The statutes of the various states are collected and set out in Bigelow, *Fraud*, 535-636, Boston, 1877.

§ 1. All fraudulent conveyances, suits, judgments, executions, or contracts, made or contrived with intent to avoid any debt or duty belonging to others, shall, notwithstanding any pretended consideration therefor, be void as against those persons only, their heirs, executors, administrators, or assigns, to whom such duty belongs.

§ 2. Any party to any such fraudulent proceeding, who shall wittingly justify the same as being in good faith and on good consideration, shall forfeit one year's value of any real estate and the whole value of any personal estate conveyed, charged, or contracted for thereby; half to the party aggrieved who shall sue for the same, and half to the state.¹

¹ G. S. Rev. 1875, title 18, c. 8.

CHAPTER IV.

CONSTRUCTION OF THE STATUTE.

§ 1. INTRODUCTORY.

WITH all the materials of three centuries at command it is safe to say that a better statute could now be framed, by a skilled hand, and possibly better ones have been framed,¹ for the avoiding of fraudulent alienations than the one above quoted, or than the later one, of Elizabeth. But the law as we have it as yet, and as we are likely to have it for a long time to come, is, or is directly founded upon, the legislation of Elizabeth as expounded by the courts and affected by collateral legislation during a period of some ten generations; and the bulk of the law now consists of materials furnished by judicial construction,²—materials, with the statutes, for the codifier of some later time.

Construction has indeed built up, around the statutes of Elizabeth, so great and important a body of law that it has come to pass that the inquiry at present almost always is, not what are the words of the statute, chiefly, but what has construction done in the particular case? And this accordingly is the inquiry to be pursued in this volume in the examination of the Elizabethan legislation. But that inquiry involves a preliminary question of very great importance, to wit, whether any, and if any, what particular theory of construction has been consciously or actually set before the

¹ Some distinction may perhaps be claimed for the statute of New York. See ante, pp. 34–36.

² The term is used broadly, to include interpretation, exposition, and whatever part the courts have borne in examining the meaning of and building up the law.

courts as a guide to their action, in the absence of any specific direction in the legislation itself.

The general answer to this question was given before the end of the reign of Elizabeth; indeed while the statute may be said to have been yet fresh from the hand of the legislature, for the whole subject was before Parliament from time to time after the statute of 13th Elizabeth was passed.¹ And at the outset of the administration of the law the rule in regard to the construction of statutes against fraud was re-affirmed. 'Because fraud and deceit abound in these days more than in former times, it was resolved by the whole court,' in a famous case,² 'that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud.' This resolution was deliberately made upon an attempt of the defendant to escape liability by narrowing the sense of the statute; and a like attempt had come off no better in another case, decided a few years earlier, in the Exchequer Chamber, by resolution of 'all the barons.'³ How far and in what way has this rule been carried out in later times? This is one of the most serious questions in the law of fraud.

The statute reprobates alienations of 'lands and tenements,' 'goods and chattels,'⁴ with intent to hinder, delay, or defraud creditors; if the act is not done with such 'intent,' it is not within the meaning of the statute. Several important questions, some supposed to involve, some actually involving the rule of construction, lie upon the very surface of this statement, and may accordingly be taken for immediate consideration. (1) Do 'lands and tenements' and 'goods and chattels' embrace all species of property, that is, all things which may

¹ 14 Eliz. c. 10, § 10; 27 Eliz. c. 4; 29 Eliz. c. 5, §§ 1, 2. scripts are not 'goods and chattels' within the statute. *Dart v. Wood-*

² *Twyne's Case*, 3 Coke, 80, 44 Eliz. house, 40 Mich. 399. See *infra*, p. 43, note. Compare *Caird v. Sime*,

³ *Pauncefoot v. Blunt*, 35 & 36 12 App. Cas. 326, as to notes taken from *class-room* lectures given by a

⁴ An author's unpublished manu- teacher.

have pecuniary value? (2) What do the words 'intent to hinder, delay, or defraud' mean?

It will be found that the first of these questions is a compound one, including (*a*) a general question of the kinds of property held to be within the statute, (*b*) the question whether want of pecuniary value in the things transferred can be considered, and (*c*) whether the statute has enlarged the rights of creditors, enabling them to reach property in the hands of an alienee of the debtor which could not be reached in the debtor's hands; and this last question will lead us in the first place to a consideration of conveyances of exempt property and of dower, and then to the real meaning of a certain conflict of authority between Lord Hardwicke and Lord Thurlow in regard to choses in action.

§ 2. KINDS OF PROPERTY EMBRACED.

The first question in effect is, Does the statute of Elizabeth embrace all kinds of property? Saving property exempt by law, of which later,¹ the common answer is in the affirmative. Thus the statute is declared to include equitable as well as legal property,² future as well as present interests, interests in remainder and interests in reversion,³ interests contingent as well as interests vested,⁴ joint as well as individual property,⁵ valuable improvements⁶ and increments of property,⁷ choses in action and money,⁸ and in a word,

¹ *Infra*, § 4.

² *Planters' Bank v. Henderson*, 4 Humph. 75; *White v. McPheeters*, 75 Mo. 286; *Ede v. Knowles*, 2 Younge & C. Ch. 172.

³ Cases just cited; *Goldsmith v. Russell*, 5 De G. M. & G. 547; *Sexton v. Canney*, 8 L. R. Ir. 216.

⁴ *French v. French*, 6 De G. M. & G. 95; *White v. McPheeters*, 75 Mo. 286.

⁵ *Langford v. Thurlby*, 60 Iowa, 105.

property acquired by joint industry of husband and wife.

⁶ *Lynde v. McGregor*, 13 Allen, 182; *Shand v. Hanley*, 71 N. Y. 319. See *Lockhard v. Beckley*, 10 W. Va. 87; *Moore v. Lampton*, 80 Ind. 301; *Robinson v. Clark*, 76 Maine, 493.

⁷ *Wheeler v. Wallace*, 53 Mich. 356; *Ferry v. Strohecker*, 44 Mich. 337, crops grown. As to rents and profits see *Marshall v. Croom*, 60 Ala. 121.

⁸ *Infra*, § 5.

generally speaking, whatever else, not exempt by statute, is embraced under the conception of value.¹

There is however a more direct and summary way of putting the case. The object of the statute of Elizabeth is to enable creditors effectively to defeat the attempts of their debtors to circumvent them by alienation; and hence whatever property, using that term in the broadest sense, would be subject, by process of law or of equity, to the claims of creditors, while in the hands of the debtor, comes, on alienation with intent to hinder or defraud creditors, within the statute of Elizabeth.² Nay, any other way than this, of putting the case, is dangerous. The question whether a particular kind of property may be reached in the hands of the debtor's alienee, assuming the alienee to stand only upon the debtor's rights, is not a question of construction of the statute of Elizabeth at all; to

¹ The debt should be due at least in part at the time of the suit to set aside the conveyance. *Collins v. Nelson*, 81 Ind. 75; *Evans v. Thornburg*, 77 Ind. 106; *Williams v. Bizzell*, 6 Eng. 716. But in proper cases an injunction against making the conveyance could be had, though the debt was not yet due. *McCormick v. Hartley*, 107 Ind. 248. Some of the cases, as *Williams v. Bizzell*, *supra*, and others (post, p. 80, n.), require judgment and return of nulla bona; but that is confusing the statute of Elizabeth with the ordinary creditor's bill to reach equitable interests. In regard to work done by a debtor voluntarily for another see *Cane v. Rogers*, 55 Iowa, 650: 'Where therefore an insolvent man performs labor upon a farm owned or hired by his wife, and the design and result of the labor are merely to furnish reasonable family support, we see nothing, in such facts alone, to evince an intention to defraud his creditors.'

² The authorities will appear later. See §§ 4, 5. An author's unpublished

manuscripts cannot be reached by creditors. *Dart v. Woodhouse*, 40 Mich. 399 (MS, abstract books); *Stevens v. Gladding*, 17 How. 447; *Stephens v. Cody*, 14 How. 528; *Prince Albert v. Strange*, 1 Macn. & G. 25; *Banker v. Caldwell*, 3 Minn. 94; *Freeman, Executions*, § 110. Nor can the author be compelled to publish them. *Ib.* And a transfer of them to another, though alleged to be in fraud of creditors, will not enable the author's creditors to reach them. *Dart v. Woodhouse*, *supra*. A sale might however, in a particular case, be a publication, so as to make the manuscripts liable to creditors of the *buyer*; but quære whether the same sale, though conceded to be intended to defeat creditors, would enable the seller's creditors to reach them? It would seem not, for the mere sale, with the added intent, could not enlarge the rights of creditors. See *Dart v. Woodhouse*, *supra*; and see § 4, *infra*. Prior publication by the author, or by another on his authority, would of course make a different case.

put the question so has proved mischievous more than once, as will appear later. The true question is whether the particular thing is subject at all to the claims of creditors; and that will be a question of another branch of the law,—it may be of the common law, it may be of the construction of some special or of some general statute quite independent of the statute of Elizabeth.

There is again no question, properly arising under the statute, apart from matters touching delivery of possession, secret trusts and the like, in regard to the title to property; the general question is whether, assuming the debtor to have a title, the property is liable to the claims of creditors and so falls within the purview of the statute. Indeed it must be assumed that the debtor has, or that he has been held out to have,¹ an indefeasible title; for if his title is defeasible against

¹ A good illustration is afforded by *Budd v. Atkinson*, 30 N. J. Eq. 530. A buys a farm and has the title taken in the name of B, his son, who takes possession. B afterwards contracts debts, and then, on request of A, reconveys the land to A, voluntarily. The reconveyance is void as to creditors of B relying on B's title to the property, though B declares that he did not know that the title was made to him, and that A never intended to give the farm to him. B has been held out as owner.

Compare also cases of estoppel by holding out, of which *Pickard v. Sears*, 6 Ad. & E. 469, is the leading and typical example. *Bigelow*, Estoppel, 544 et seq., 4th ed. See also *Carpenter v. Carpenter*, 27 N. J. Eq. 502, where an alleged holding out was not established; *Besson v. Eveland*, 26 N. J. Eq. 468; *State v. Martin*, 77 Mo. 670; *Hockett v. Bailey*, 86 Ill. 74 (husband dealing in his own name with avails of property alleged to be his wife's); *Robinson v.*

Brems, 90 Ill. 351 (same). In *Hockett v. Bailey* the court says: 'In *Wortman v. Price*, 47 Ill. 22, it was held, where the wife advances capital to the husband with which he engages in trade, such capital and its fruits in the business will be subject to the debts of the husband. The same doctrine was again announced in *Patton v. Gates*, 67 Ill. 164. [See also *Robinson v. Brems*, 90 Ill. 351.] The principle of those cases is applicable to this one. Here the husband had the wife's money; he invested it in a farm in his own name, worked the farm, increased the capital, sold and reinvested. Now while it may be true, if this was a controversy solely between husband and wife as to the ownership of the property, it might be held that the wife might recover, yet where the rights of creditors of the husband intervene, a different question arises.' See *Glaister v. Hower*, 8 Ves. 195, Lord Eldon; *Erdman v. Rosenthal*, 60 Md. 312; *Hurlburt v. Jones*, 25 Cal. 225; *Bennett v. Stout*, 98 Ill. 47;

creditors, the case is again one of title and not one of fraud upon creditors. Creditors have the right to look to his property and to that only; only by disposing of that can there be a fraud upon creditors within the statute.¹ To consider questions of title would carry us far afield, into the proper domain of other works.²

Further the question whether the *product* of property assigned or conveyed by a debtor in fraud of his creditors, which product has been made by the labor and capital, or either, of the assignee or grantee, may be treated by creditors as property of the debtor-assignor, is not a question of the construction of the statute of Elizabeth, but a common-law question of right or title;³ and so of many other questions of the kind. If however there is a question of participation in the debtor's fraud, or of knowledge or notice of it, there arises a question under the statute. The fact of

Humes v. Scruggs, 94 U. S. 22; *Warner v. Warren*, 46 N. Y. 228.

An illustration in contrast may be seen in *Bishop v. State*, 83 Ind. 67. It was there held of one who had wrongfully taken to himself the title to land bought with the money of another, had held the same for thirty-three years, paid the taxes all along, made improvements upon and occupied the premises as a residence, and, having subsequently become insolvent, now conveyed the property to the person wronged, that it was error to instruct the jury that such facts were enough to justify a finding that the conveyance was a fraud upon the grantor's creditors. See also *Mitchell v. Colglazier*, 106 Ind. 464; *Kennedy v. Lee*, 72 Ga. 39.

¹ See e. g. *Donegan v. Davis*, 66 Ala. 362 (referring to *Godfrey v. Hays*, 6 Ala. 501; *Nightingale v. Withington*, 15 Mass. 272), in regard to money earned by a minor and used in the purchase of property in the name of his mother;

creditors of the father claiming that the money was the father's. *Infra*, p. 51.

² Thus whether money which a wife lays out in insuring property fraudulently conveyed to her by her husband is her money, is not a question of the statute of Elizabeth, but of her title or right to the money. If it be hers, it follows that creditors of the husband cannot claim the insurance money in case of loss. *Bernheim v. Beer*, 56 Miss. 149. See *McLean v. Hess*, 106 Ind. 555. So whether money with which a debtor buys property, the title to which he takes in his own name and afterwards conveys to his wife, was the wife's money; if it was, of course the conveyance to her is good, if there has been no 'holding out' by the wife, as there was in the cases in note 1, p. 44. *Taylor v. Duestenberg*, 109 Ind. 165; *Eagan v. Downing*, 55 Ind. 65.

³ *Wheeler v. Wallace*, 53 Mich. 356; *Ferry v. Strohecker*, 44 Mich. 337; *Forbush v. Willard*, 16 Pick. 42.

being a volunteer, it cannot be too carefully observed, does not make a case of participation; nor, properly speaking, is a volunteer a purchaser with notice,—he merely stands in the place of the grantor in regard to the title to the property.¹ And the distinction may be important; it is important here. New products made in good faith by the volunteer, of his own means, are not the additions of a participant in fraud;² and the question of creditor-rights of the grantor cannot properly be determined by the statute of Elizabeth. It may turn upon the law of confusion of goods, and so of the ability of the volunteer to separate his own.³

The cardinal rule is this: The statute cannot be extended to create new rights in the creditor.⁴ ¶

Assuming however the debtor's good title to the property in question, it matters not how he may have acquired it, whether he has paid for it or it has been given to him, or given to him upon a secret trust in favor of the giver⁵ or another; nor does it matter that he may have paid for property, which he has bought for and conveyed to another, with money unlawfully obtained, if the money cannot be followed by the person from whom it was obtained. In a case in South Carolina⁶ the judge had charged the jury that if certain property had been paid for by the debtor with money which he had won at play, without abstracting anything a creditor could take, the disposition of such property in favor of his wife and children was no less lawful than would have been the loss of the money at play or the spending it in gratifica-

¹ Vol. 1, p. 403.

² *Peters v. Light*, *supra*. The same is true of fixtures, accretions, and the like; these may indeed go to the creditor, not however because of participation in fraud, but because of rules of property.

³ Vol. 1, pp. 575, 576. See also *Smith v. Sanborn*, 6 Gray, 134; *Lehman v. Kelley*, 68 Ala. 192; *Seeds v. Kahler*, 76 Penn. St. 262; *Rose v.*

Sharpless, 33 Gratt. 153; *French v. Reel*, 61 Iowa, 143. Compare also cases of improvements made by a debtor upon his wife's land. *Moore v. Lampton*, 80 Ind. 301.

⁴ *Post*, pp. 59, 72, 74.

⁵ *Budd v. Atkinson*, 30 N. J. Eq. 530, *supra*, p. 44, note.

⁶ *Bank of South Carolina v. Ballard*, 12 Rich. 259.

tion of vice. But this was held wrong; the higher court thought it wholly immaterial from what source the money was derived.

The question in that case arose however not upon a contest over the right of the creditors to reach the property in question, but over the right of the debtor to a discharge under the Insolvent Debtors' Act. Still it is probable that the result would have been the same. But in such a contest it could hardly be said to be immaterial in what manner the property had been acquired. If the property of the debtor could be recovered back from him, as where it was acquired by fraud, or by a mistake of which the law would take cognizance, or by any other defeasible right, and the creditor's giving credit even upon reliance on the debtor's right to the property was due to no fault or conduct of the person entitled to be restored to the property, then the property could not be taken by creditors of the apparent owner. Nothing but purchase for value without notice would cut off the equity or right of the true claimant to the property. But this is one of the questions of title already barred out.

§ 3. VALUE OF THE SUBJECT ALIENED.

The question whether the subject of alienation, being property, is valuable or not cannot, generally speaking, be taken into consideration; though the contrary has once or twice been held. In a Pennsylvania case¹ the judge had charged the jury that certain conveyances of a debtor were void against creditors provided they were calculated to hinder creditors; and that, he declared, depended upon the question of value. If the property was incumbered in the hands of the debtor to its full value, and could have been made to yield

¹ *Garrison v. Monaghan*, 33 Penn. 140. Dispositions of trivial things St. 232. See also as to gifts of slight value *French v. Holmes*, 67 Maine, 186; *Hopkirk v. Randolph*, 2 Brock. 186. would not, it is conceived, be considered a matter justifying interference.

nothing to his creditors, they were not prejudiced, and the conveyance, though voluntary, was valid against them. But this ruling was rightly disallowed as fraught with great danger; for under it any property might be held if only the holder could make a jury believe it to be worthless.¹

On the other hand if a debtor buys property from another, and the former's creditors seek to impeach the transaction as being a fraud upon them, it seems that the debtor is entitled to show that the consideration which was to move from him entirely failed; since this is to show that he parted with none of his property in the transaction, and the creditors are at least as well off as before.² At all events it is held that where A conveyed property to B's wife and children, upon a consideration on the part of B which entirely failed, so that B parts with nothing for the property, the transaction is not a fraud upon B's creditors; as B has given nothing for the property, no trust can result to him.³

Indeed there appears to be a more substantial qualification to the proposition that the value of the property cannot be taken into account. In regard to voluntary improvements laid out by a debtor upon the property of another, as e. g. upon his wife's land, it is laid down that if the sum (or doubtless the labor) expended did not increase the value of the property, creditors have no equity against the owner, unless the owner participated in fraud upon them; it is only for and to the extent of increased value by such improvements that creditors have a claim.⁴ This clearly would not be true of expenditures, such as payment of taxes, made to save the property to the owner.

A recent New York case⁵ touching this subject goes to the verge of the law, if not beyond. A suit had been brought to

¹ *Fassit v. Phillips*, 4 Whart. 399, was overruled. But see *Parsell v. Patterson*, 47 Mich. 505; *Baldwin v. Rogers*, 28 Minn. 544.

² *Hauby v. Logan*, 1 Duval, 242.

³ *Ib.* Distinguishing on the point of trust *Doyle v. Harper*, 1 Dana, 536.

⁴ *Lynde v. McGregor*, 13 Allen, 182.

⁵ *Shultz v. Hoagland*, 85 N. Y. 464.

set aside as fraudulent an assignment of partnership and individual property for creditors, executed by partners, and purporting to be their whole estate, to one of the defendants. One of the grounds for impeaching the transaction was that four considerable sums of property had been omitted by the debtors from the schedules, and had not been disclosed, and that the fact had not been explained. But it appeared that two of the omitted funds had afterwards been turned over to the assignees; that the debtors' ownership of another of the four, a fund in a savings bank, was for the larger part in dispute, and was left in doubt by the evidence; that 'the balance was probably worthless;' and that the evidence in regard to the fourth fund was too weak to raise an inference of fraud. Upon these facts the court reached the rather doubtful conclusion that the omission from the schedules was not fatal.¹ The question, it is believed, in such cases is not whether there was fraud in the popular sense, but whether there may not be some value in the things omitted; if there is, there is an intent to defraud in the legal sense, which however might be condoned by the assignee's subsequent receiving them.²

Again while, generally speaking, a man in financial difficulties is in effect forbidden under the statute of Elizabeth from releasing, except upon valuable consideration, claims in

¹ 'The [omitted] claim upon the Freedmen's Bank has,' said the court, 'a different explanation. The answers put in issue the ownership of any such claim by the assignees at the date of the assignment. The proof leaves that fact in doubt. . . . The balance was probably worthless. That probability is so strong from the evidence as to make it a matter of little consequence whether it was inventoried or not. The omission from the schedules, or a failure to deliver to the assignee, a worthless demand might be an unwise or imprudent neglect, but can scarcely serve as the basis for an inference of fraud.'

In South Carolina an insolvent firm need not, in making an assignment of all property, include the individual property of the partners; the partnership being regarded as a distinct entity, like a corporation so far. *Trumbo v. Hamel*, 8 S. E. Rep. 83.

² *Shultz v. Hoagland* was cited as authority in *Hoyt v. Godfrey*, 88 N. Y. 669; but the latter was a criminal case, — a motion to vacate an order of arrest of a debtor for discharging a 'valueless' debt. An actual intent to defraud was well held necessary.

the nature of property, running in his favor, there are still certain things of value which are peculiarly personal to the one entitled and, for that reason, subject to his own pleasure whether to take, to refuse, or to release. Such are gifts upon some condition, or indeed gifts outright; and such indeed are certain benefits which one may be entitled to of right. One may forego the benefit of publishing a valuable manuscript;¹ one may forego the benefit, when sued, of a defence of the Statute of Frauds (by some authorities),² or of the Statute of Limitations,³ or of usury,⁴ or any other defence, it seems, which is given by law on some ground of mere policy consistent with the justness of the plaintiff's demand.⁵

Further the same principle would permit one, it seems, to forego the benefit of certain rights of action, such as an action based upon fraudulent representations⁶ or an action for a wrong to one's person or reputation only. The mere foregoing such personal benefits would not be fraudulent towards creditors; nor could that alone be evidence of fraud, though of course to allow judgment to go against oneself might be part of a scheme of fraud. Creditors could not hinder, or then or afterwards object, unless indeed there were something more than the mere foregoing, or unless the debtor's rights have passed from him, as e. g. to an assignee in bankruptcy. The statute of *Elizabeth* does not take away the benefit of a mere privilege.⁷

Upon similar grounds the statute is not to be construed as

¹ *Dart v. Woodhouse*, 40 Mich. 399; ante, p. 43, note.

² *Livermore v. Northrup*, 44 N. Y. 107; *Sedgwick v. Tucker*, 90 Ind. 271. But see post, pp. 133-135.

³ *Brookville Bank v. Kimble*, 76 Ind. 195; *Murray v. Judson*, 9 N. Y. 73.

⁴ *Murray v. Judson*, supra; *Spencer v. Ayrault*, 10 N. Y. 202; *Wheelock v. Wood*, 93 Penn. St. 298.

⁵ *Comp. Cottrel v. Smith*, 63 Iowa, 181, conveyance on a strong moral ob-

ligation sustained against creditors. But that is the verge of the law.

⁶ Creditors could not object, for only he to whom the representations were made, or for whom they were intended, could avail himself of them. Vol. 1, pp. 197, 198.

⁷ Privilege may of course be an ordinary property right, as e. g. a water privilege. That would be a different thing.

prohibiting a father from so manumitting his minor son as to authorize him to contract on his own behalf with an employer and receive his earnings to his own use;¹ this the father may do though insolvent at the time.² Although he is legally entitled to take the wages of his son, he is not bound to do so for the benefit of creditors;³ nor is there any way by law by which creditors can become substituted to the father's rights so as to enforce payment to them of what the father has released. And the son's emancipation may be as complete where the son continues to live with his father as where they separate.⁴

§ 4. EXEMPTION LAWS: DOWER.

Another question, sometimes treated as one of construction of the statute of Elizabeth, has arisen touching the effect of

¹ Brown's Appeal, 86 Penn. St. 524; McCloskey v. Cyphert, 27 Penn. St. 220; Galbraith v. Black, 4 Serg. & R. 207; United States v. Mertz, 2 Watts, 406; Johnson v. Silsbee, 49 N. H. 543; Penn. v. Whitehead, 17 Gratt. 503; Nightingale v. Withington, 15 Mass. 272; Whiting v. Earle, 3 Pick. 201; Godfrey v. Hays, 6 Ala. 501; Donegan v. Davis, 66 Ala. 362.

² Brown's Appeal, supra; Holdship v. Patterson, 7 Watts, 547. See Donegan v. Davis, supra.

³ Brown's Appeal, supra; Holdship v. Patterson, 7 Watts, 547; Donegan v. Davis, supra.

⁴ Brown's Appeal, supra; McCloskey v. Cyphert, supra; Donegan v. Davis, supra. On the other hand it is held that, without an express contract, a father becoming insolvent cannot consider himself as in debt to an adult son, who continues to live with him after majority, for services rendered by the son, so as to make the value of these a consideration for an otherwise voluntary conveyance. Hack v. Stewart, 8

Barr, 213; Walker's Estate, 3 Rawle, 243; Candor's Appeal, 5 Watts & S. 513. For what will constitute emancipation for the purpose see cases in note 1. In Donegan v. Davis, supra, the court says: 'We cannot agree that in every case there must be an absolute abandonment of home, a disrupting of family ties, before emancipation of a minor child is accomplished. Emancipation vel non is at most a question of fact to be determined by the circumstances in evidence. If the father be insolvent, and in the transaction assailed by creditors of the father there is simulative or other evidence of fraud, or secret trust, this should be decisive of the claim of emancipation, and the earnings should be adjudged to belong to the father.' But the language of the last sentence appears to be too strong. The simulation or secret trust might be decisive in favor of creditors of the son; how could it be so in favor of the father's creditors, unless the simulation was the father's?

laws exempting certain property, specific or in value, from the claims of creditors. The question has arisen in one of the three following ways: (1) The debtor, having property subject to the claims of creditors, has, with a view of defrauding them, in some way reduced his property down to an amount in value falling within the exemption laws; or (2), with a like view, he has exchanged such property for, or bought with money or the like, some kind of property specifically exempt; or (3), having exempt property, he has, with a like view, conveyed away the same to some one standing only upon his rights.

A case¹ often cited arose in the Supreme Court of New York, involving the first of these situations. The plaintiff brought replevin of twenty runs of woollen yarn, a quantity exempt from the claims of creditors; which yarn had been taken by the defendant on execution. The defence was that the plaintiff, having been possessed of a quantity of the yarn beyond the amount exempted, had reduced that quantity to the twenty runs, with intent to defraud his creditors; and the lower court had ruled, as matter of law, that such conduct was a fraud upon creditors. The Supreme Court reversed this decision, on the ground however that it was a question of fact whether the plaintiff's conduct had been fraudulent. It was declared that if the plaintiff had placed himself upon his exempt property in order to defraud his creditors, by a sale of his sheep and wool, the jury might put him beyond the reach of exemption by sustaining the levy. His sales or other arrangements, it was said, would come within the words of the statute of 13th Elizabeth, or, if not, were void at common law.²

With regard to cases of this kind it is clear that there is a confusion of thought in the doctrine expressed. The statement that the sales or other arrangements of the debtor, in

¹ Brackett v. Watkins, 21 Wend. 68.

² Comp. Rose v. Sharpless, 33 Gratt. 153, post, p. 56.

reducing his property to the point of exemption, were, if made with intent to defraud his creditors, within the statute of Elizabeth is quite true. Such dispositions would be illegal; but that does not reach the difficulty. The real question is whether what remains after these dispositions is itself to be deemed to have been brought within the law of fraudulent conveyances by reason of the fraud in those dispositions; that is, has property of a debtor, which has not been the subject of any transfer at all, been brought within the statute of Elizabeth because other property of the debtor, of the same kind and of the same lot, has been fraudulently transferred? It is difficult to see how this can be answered in the affirmative.¹

The next question is whether non-exempt property may be exchanged for, or whether money or the like may be used to buy, exempt property, when the act is done with intent to defraud creditors.² If the ground upon which the New York case above referred to was decided is correct, there is reason for answering the question in the negative; and the New York case is not without support in reported decisions of different kinds, which have taken the same ground.³

The second of the cases cited however, in which the New York case was referred to as authority, raised a very different question, and was considered upon very different lines. The

¹ The New York case was denied in *O'Donnell v. Segar*, 25 Mich. 367, and in *Comstock v. Bechtel*, 63 Wis. 656, and is contrary to *Callaway v. Carpenter*, 10 Ala. 500, *Moseley v. Anderson*, 40 Miss. 49, *Stevenson v. White*, 5 Allen, 148, and *Bean v. Hubbard*, 4 Cush. 85. It is also inconsistent with other cases to be noticed. But it has some support, as will be seen.

Exempt property cannot, by the better rule, be taken because non-exempt property has been effectually concealed. *Megehe v. Draper*, 21 Mo. 510. But

see Pennsylvania cases, post, p. 62, note 2; and see *Rose v. Sharpless*, 33 Gratt. 153.

² Of course the proceeds of the sale of specifically exempt property, such as a homestead, are not exempt unless made so by statute. *Adams v. Deers*, 62 Miss. 354.

³ *Long v. Murphy*, 27 Kans. 375, is directly in point. See *Grymes v. Bryne*, 2 Minn. 89; *Riddell v. Shirley*, 5 Cal. 488; *Rose v. Sharpless*, 33 Gratt. 153; *Strouse v. Becker*, 38 Penn. St. 190; *Pratt v. Burr*, 2 Biss. 86.

question was whether a merchant could have the benefit of the exemption law of Minnesota, as it stood; and it was held that such a person could not, the exemption law being construed as referring only to persons who earned their livelihood in whole or in part by the use of tools and utensils. In a case¹ before the Supreme Court of Michigan of replevin for a yoke of oxen seized on execution (where also a point arose whether the plaintiff was within the class of persons intended by the exemption law) it appeared that a question had been asked at the trial whether the plaintiff had sold other property than that in question in order to bring himself down to the exemptions of the law. This the court held to be improper. Chief Justice Christiancy, speaking for the court, said that he could not see how the plaintiff could be deprived of the statutory exemption 'by clear proof that he had purposely disposed of all the property he had which was subject to execution, for the purpose of investing the proceeds in, or converting them into, any kind of property which was exempt.' And there was no exception or qualification in the statute such as that urged.² The same view is taken by other courts.³

There can be no serious doubt of the correctness of this view, so far as any attempt is made to rest the creditor's claim upon the statute of Elizabeth or the like legislation. The statute deals only with alienations made *by* the debtor;⁴ it does not avoid alienations made to the debtor, except under

¹ O'Donnell v. Segar, 25 Mich. 367.

² 'When the statute,' said the learned Chief Justice, 'exempts from execution certain kinds of property to certain amounts, without any exception or qualification on the ground here urged, I can see no intelligible ground on which it can be held fraudulent for any man whose property does not in the aggregate exceed the aggregate value of all the exemptions, but part of which, in its present shape, is not exempt, to convert or exchange it into those

particular kinds of property which are exempt.' O'Donnell v. Segar, *supra*.

³ Comstock v. Bechtel, 63 Wis. 656.

⁴ Some courts hold that property paid for by the debtor, but granted directly to a third person, is not within the statute of Elizabeth. Edmonson v. Meacham, 50 Miss. 34; Crozier v. Young, 3 Mon. 157; Gowing v. Rich, 1 Ired. 553. But the conveyance may be void at common law just as if it were deemed within the statute. Edmonson v. Meacham, *supra*.

special circumstances having no bearing upon the present question. If, in favor of one standing only upon his rights, the debtor, with intent to delay or defraud his creditors, parted with property which was subject to the claims of creditors under the statute of Elizabeth, that act was unlawful, and the creditors could still reach the property;¹ but as regards the consideration received for it, the statute has nothing to do with the case. In this state of things appears the exemption law, by which the property received by the debtor becomes exempt, unless the way in which it was received makes a difference. The question then, properly speaking, turns upon the effect of the exemption law, and not upon the statute of Elizabeth; of that question presently.

The third question in regard to the effect of conveying away exempt property with intent to defraud creditors, may be introduced by a statement of the law of Pennsylvania. It is there laid down that the exemption laws are intended 'for the honest poor, not the roguish';² they must be denied to debtors who 'shuffle and conceal' their property;³ the rule 'is founded in a sound morality and is agreeable to the spirit and intention of the exemption law.'⁴ This doctrine is in itself equally applicable to conveyances of lands and conveyances of goods; and so in point of fact it is applied in Pennsylvania.⁵ And it finds some support elsewhere. Thus it has been said (obiter) in Illinois that if a deed of homestead land was taken by a purchaser in the name of his wife, with design simply to acquire property to be held in fraud of creditors, the law would subject it to payment of his debts;⁶ though merely to

¹ *Comstock v. Bechtel*, 63 Wis. 656.

² *Emerson v. Smith*, 52 Penn. St. 90.
See *Shinn v. McPherson*, 58 Cal. 596.

³ *Strouse v. Becker*, 38 Penn. St. 190.

⁴ *Ib.*; *Rose v. Sharpless*, 33 Gratt. 153. See also *Gibbs v. Patten*, 2 Lea, 180.

⁵ *Huey's Appeal*, 29 Penn. St. 219,

lands; *Dieffenderfer v. Fisher*, 3 Grant's Cas. 30, goods. See other cases, *infra*.

⁶ *Cipperly v. Rhodes*, 53 Ill. 346; *Getzler v. Saroni*, 18 Ill. 511; *Cassell v. Williams*, 12 Ill. 387. But see *Vaughan v. Thompson*, 17 Ill. 78; *Muller v. Inderreider*, 79 Ill. 382; *Lenpold v. Krause*, 95 Ill. 440.

buy homestead land to be held as exempt would not be contrary to law.¹ And the same view appears to have been taken in some other states.²

In Virginia too the language of the courts of Pennsylvania has been expressly adopted as a correct statement of law. The case³ however in which this was done was a case of goods. A 'householder or head of a family,' in the language of the exemption law, executed a conveyance of what was claimed to be exempted homestead in goods, under the statutes of Virginia, in furtherance of a design to defraud his creditors. These goods, which consisted of a stock in trade, suddenly reduced by doubtful means⁴ by the debtor-owner to the point of exemption, included goods paid for and goods not paid for indistinguishably mixed; goods not paid for not being within the exemption law.⁵ It was held that, in the absence of any separation of the property capable of exemption from that which was not, the conveyance was a fraud upon creditors.

This decision, possibly sound in itself,⁶ was however put, in part, upon the ground taken by the courts of Pennsylvania, as above quoted. But the courts of Virginia repudiate that ground, or at all events do not act upon it, when it comes to the case of conveyances of exempted lands. It matters not that these are made with intent to defraud creditors; the debtor is entitled to the exemption; the supposed policy of the law is ignored. And as this has had the repeated sanction of the courts of that state, one important decision of the kind

¹ *Ib.* See *Faurote v. Carr*, 108 Ind. 123; *Burge v. Bolin*, 106 Ind. 175; *Hixon v. George*, 18 Kans. 253. And a man may pay off a mortgage on his homestead, and so make it exempt, though insolvent at the time and taking for the purpose money subject to the claims of his creditors. *Randall v. Bufington*, 10 Cal. 491 (distinguishing *Riddell v. Shirley*, 5 Cal. 488, as to which *quære*); *In re Henkel*, 2 Sawy. 305.

² *Piper v. Johnston*, 12 Minn. 60, 66 (on the st. 13 Eliz.); *Gibbs v. Patten*, 2 Lea, 180; *Chambers v. Sallie*, 29 Ark. 407. See also *Currier v. Sutherland*, 54 N. H. 475.

³ *Rose v. Sharpless*, 33 Gratt. 153.

⁴ See *Brackett v. Watkins*, 21 Wend. 68, ante, p. 52.

⁵ Code of 1873, c. 183, § 1.

⁶ But see *infra*, p. 64.

being since the case under consideration,¹ it is to be taken that the Pennsylvania ground has not really been established in Virginia, and that the approval of it was incautious.

There is other authority also opposed to the Pennsylvania rule. In a case² in Texas, a suit against a husband and his wife, in which a creditor sought to subject a homestead to the payment of his demand, the creditor had offered to prove that the husband, at the time of contracting the debt in question, was unmarried and in failing circumstances, that in that state of things he had gone about building the dwelling now claimed as a homestead, with the means for which he had contracted the debt, that he was at the time aware of his financial situation, and that he then married and claimed the building against his creditors as homestead. The evidence was rejected at the trial, and rightly, as the Supreme Court now held. The court said that the wife was equally interested with the husband in the homestead,³ and that there had been no offer to show that she had been a party to any fraudulent design; but even if such an offer had been made, it was considered that it should have been refused, as 'it would have exposed to animadversion the motives with which the defendants contracted marriage.'

The case, put upon this ground, does not go quite far enough; for it might still be said that the decision is consistent with the idea that a fraudulent design on the part

¹ *Marshall v. Sears*, 79 Va. 49; *Shipe v. Repass*, 28 Gratt. 729; *Boyn-ton v. McNeal*, 31 Gratt. 459.

² *North v. Shearn*, 15 Tex. 174.

³ This is the ground commonly taken, and is of course quite true. The exemption is intended for the family, not for the husband alone. See e. g. *Castle v. Palmer*, 6 Allen, 401; *Connor v. McMurray*, 2 Allen, 202; *Cox v. Wilder*, 2 Dill. 45; *Vogler v. Montgomery*, 54 Mo. 557, 584; *McFarland v. Goodman*, 6 Bias. 111, 116. The right once ac-

quired continues however, according to the better view, notwithstanding the owner's loss of his family. *Silloway v. Brown*, 12 Allen, 34; *Doyle v. Coburn*, 6 Allen, 71; *Barney v. Leeds*, 51 N. H. 253; *Webb v. Cowley*, 5 Lea, 722; *Beckmann v. Meyer*, 75 Mo. 333; *Kimbrell v. Willis*, 97 Ill. 494; *Stanley v. Snyder*, 43 Ark. 429. Contra, *Cooper v. Cooper*, 24 Ohio St. 488; *Santa Cruz v. Cooper*, 56 Cal. 339; *Gallighan v. Payne*, 34 La. An. 1057.

of a debtor in making a conveyance of property other than homestead would render it invalid. But the Virginia cases (of lands), above referred to, go to the point. A case¹ in Kansas also appears to be in point. The court there laid it down for law that no fraud upon creditors could be committed by a debtor's purchasing homestead property in the name of his wife, or in subsequently paying for the property or in making improvements thereon, unless the creditor had some special interest in or claim upon the funds so used. This view is not put upon the wife's interest in the property; it is broad enough to cover the case of a conveyance of any exempt property; and it is supported by the general current of authority.² And there is direct and ample authority of the same kind in relation to transfers of exempt personalty.³

The only one of the three cases⁴ under consideration that touches the statute of Elizabeth is this third case; we have seen that the first two have nothing to do with that statute.

¹ *Hixon v. George*, 18 Kans. 253.

² *Rankin v. Shaw*, 94 N. Car. 405; *Arnold v. Estis*, 92 N. Car. 162; *Crummen v. Bennett*, 68 N. Car. 494; *Kuevan v. Specker*, 11 Bush, 1; *Sears v. Hanks*, 14 Ohio St. 298; *Roig v. Schulta*, 42 Ohio St. 165; *Cox v. Wilder*, 2 Dill. 45; *Bell v. Devore*, 96 Ill. 217; *Lempold v. Krause*, 95 Ill. 440; *McFarland v. Goodman*, 6 Biss. 111; *Dreutzler v. Bell*, 11 Wis. 114; *O'Connor v. Ward*, 60 Miss. 1025; *Edmonson v. Meacham*, 50 Miss. 34, 40; *Lagro v. Lord*, 10 Maine, 161; *Davis v. Laud*, 88 Mo. 436; *Buck v. Ashbrook*, 59 Mo. 200; *Stanley v. Snyder*, 43 Ark. 429; *Bennett v. Hutson*, 33 Ark. 762; *Marshall v. Sears*, 79 Va. 49; *Prout v. Vaughan*, 52 Vt. 451; *Baldwin v. Rogers*, 28 Minn. 544; *Furman v. Tenny*, ib. 77; *Morrison v. Abbott*, 27 Minn. 116; *Ferguson v. Kimber*, ib. 156; *Delashmut v. Trau*, 44 Iowa, 613; *Smith v. Rumsey*, 33 Mich. 183, overruling

Herschfeldt v. George, 6 Mich. 456.

It in no way affects the case that the wife has acknowledged the deed according to law. *Kuevan v. Specker*, supra; *Sears v. Hanks*, supra; *McFarland v. Goodman*, supra. Further as to homestead see *Woodall v. Rudd*, 41 Tex. 375, 382.

³ *Bean v. Hubbard*, 4 Cush. 85; *Ketchum v. Allen*, 46 Conn. 414; *Tracy v. Cover*, 28 Ohio St. 61; *Mull v. Jones*, 33 Kans. 112; *Anderson v. Odell*, 51 Mich. 492; *Wright v. Smith*, 66 Ala. 514; *Smith v. Allen*, 39 Miss. 469, 475; *Duvall v. Rollins*, 71 N. Car. 218; *Vaughan v. Thompson*, 17 Ill. 78; *Vandibur v. Love*, 10 Ind. 54; *Burge v. Bolin*, 106 Ind. 175; *Fanrote v. Carr*, 108 Ind. 123; *Patten v. Smith*, 4 Conn. 450; *Anthony v. Wade*, 1 Bush, 110. Retaining possession in such a case has of course no effect. See the last two cases.

⁴ Ante, p. 52.

And in regard to the third case the conclusive consideration is that, according to natural and authoritative exposition, the statute was not intended to enlarge the rights of creditors further than might be necessary to enable them effectually to defeat the alienation made by the debtor; aside from this, creditors have no greater rights (under the statute of Elizabeth) against the alienee than they would have had against the debtor had there been no alienation.¹ Nor can the fact of intended fraud — the ‘shuffling and concealing’ of property — by the debtor alter the case under that statute;² at most it is only a case of fraud without damage. No right of the creditor has been impaired; fraudulent conduct, to come within the notice of the law, must touch some right.³ The debtor could have resisted, lawfully, any attempt of the creditor to take the property, even to the shedding of blood;⁴ and if, to avoid a collision and bloodshed, the debtor should in a particular case make away with the property in contemplation of an attempt to take it, how can the creditor complain? The making away, though intended to defeat or even ‘defraud’ the creditor, is only another way of saving the property to himself; what he might do by the strong hand, he only does by transfer. The latter is certainly less likely to cause mischief.

Then — to leave for a short time the statute of Elizabeth, for it is desirable to dispose of this matter now — we come to the general ground of fraud upon the exemption laws, which concerns alike all three cases above stated. Now fraud may indeed defeat one’s rights under such laws. Statute may provide a particular mode of bringing property within the

¹ *Marshall v. Sears*, 79 Va. 49; 518; *Smith v. Rumsey*, 33 Mich. 183; *Shipe v. Repass*, 28 Gratt. 729; *Roig v. Schultz*, 42 Ohio St. 165; *Sears v. Hanks*, 14 Ohio St. 298; *Cox v. Wilder*, 2 Dill. 45; *Kuevan v. Specker*, 11 Bush, 1; *Crummen v. Bennett*, 68 N. Car. 494; *Pennington v. Seal*, 49 Miss. 518; *Smith v. Rumsey*, 33 Mich. 183; *Dreutzler v. Bell*, 11 Wis. 114. See *infra*, in regard to choses in action, pp. 68 et seq.

² *Smith v. Rumsey*, *supra*.

³ *Ante*, pp. 16, 28.

⁴ *Scribner v. Beach*, 4 Denio, 448.

exemption ; and if in such a case, in fraud of the law, property is brought by some subterfuge within it which does not belong there, the act will be vain ; for all statutes, and this one no less than others, are to be liberally construed for the purpose of defeating fraud.¹ But it does not follow that conduct of a fraudulent nature touching the disposition of property which really is exempt has the effect to make it subject to the claims of creditors. Unless that be the meaning of the exemption laws, construed by ordinary rules, it cannot be true in principle that the debtor's act can have that effect. Exceptions should be drawn from the language of the statute.² The courts have sometimes, in peculiar cases, but not even then without giving cause for grave criticism, made an exception of fraud out of statutes limiting rights, not made in the statute ;³ but that is so unusual and dangerous a proceeding as not to be applied to new cases without the strongest reason. If the legislature has made a plain law limiting rights without exception, how can the courts declare that the legislature *intended* to make an exception ? Or how can they say, or have a right to say, what would have been done had attention been called to the matter ? And it is to be observed that in the cases in which this has been done, the injured party already had a strong right in justice and conscience ; cases of part performance of oral contracts for the purchase of lands, and cases of the fraudulent concealment of a cause of action, rest upon strong grounds of equity. The present is no such case.

Again there may be a case turning upon a condition. Thus statute may make it necessary, to obtaining its benefit, that,

¹ The exemption statutes are also to be liberally construed in aid of their object, as all the authorities show.

² The Pennsylvania courts never miss an opportunity to say that the exemption laws are for 'honest debtors.' See *e. g.* *Emerson v. Smith*, 52 Penn. St. 90.

But it is submitted that they should find this in the statutes themselves. These laws are elsewhere deemed to be made for debtors and their families.

³ See *ante*, p. 20, note 6 ; vol. 1, pp 24-26, 445.

upon any attempt of an officer to take property which may be exempted, the debtor shall claim the benefit of the exemption law, and demand an appraisement; so the Pennsylvania statute of 1849 provides. Or the owner may be required to separate the amount in value of special articles made exempt upon such action; so the Massachusetts statute requires in certain cases.¹ Or it may be necessary that homestead should actually be set off or reserved, before a particular piece of land can be exempt.² If then the debtor fails to take the steps required for the benefit offered to him, it follows that he loses his right;³ and it may well be urged under statute like that of Pennsylvania that where the debtor has gone a step further, and disclaimed all ownership of or right over the property, or where he has conveyed away the property and made no claim to it at the time required by law, he has waived the benefit of the statute.⁴

¹ See *Rose v. Sharpless*, 33 Gratt. 153, ante, p. 56.

² See *Spoon v. Read*, 78 N. Car. 244; *Gaines v. National Exch. Bank*, 64 Texas, 18; *Nichol v. Davidson*, 8 Lea, 389; the last case holding that a sale of land in fraud of creditors, without reserving homestead, as required in Tennessee, is an abandonment of the right in the land conveyed, and that the right does not revert upon the creditors' having the conveyance set aside. See also *Gaines v. National Exch. Bank*, supra.

³ *Stevenson v. White*, 5 Allen, 148. See Pennsylvania cases, infra. In *Stevenson v. White*, an action against an officer for conversion of iron bars, the court said: 'The sale of the iron by R S to the plaintiff having been without consideration, and with intent to defraud a creditor, and the plaintiff having participated in the fraud, he cannot maintain this action, unless it be on the ground that R held it exempt from attachment by creditors. By Gen.

Sts. c. 133, § 32, materials and stock designed and procured by a debtor and necessary for carrying on his trade and business, and intended to be used or wrought therein, not exceeding \$100 in value, are exempt from attachment. It appears that R was a blacksmith, and that he had purchased iron worth \$125, to be used and wrought in carrying on his business. But he did not separate from the rest the part which he intended thus to hold as exempt. . . . *Nash v. Farrington*, 4 Allen, 157. While the iron was in this condition R changed the intention with which he purchased it, and determined to sell it to the plaintiff fraudulently. This change of intention took away one of the requisites for its exemption, and it was delivered to the plaintiff while it was not exempt.'

⁴ *Nash v. Farrington*, 4 Allen, 157, 158, where it was said that the articles were not set apart for the use contemplated by the statute, 'nor did the plaintiff, after they were so seized,

In such a case it is clear enough that the creditor can take the property (assuming that it has not passed to any one having a better right than the debtor), regardless of the fact that the property might have been exempted; and it follows that no action for the taking can be maintained either against the creditor or against the officer.¹ The case stands as if no exemption law existed at all. This being true, it is quite unnecessary, not to say mischievous, to put the case, as is done in Pennsylvania, on the ground of fraud. It is not that the debtor has tried—and it should be observed that he tried without success—to deceive the officer and perhaps the creditor that he has lost his right; it is that he has not done what the statute required as a condition to obtaining its benefits.²

But again it is said that a debtor may *forfeit* his right to

claim any part of them as exempt from execution.' Compare cases in which one's goods have become mingled with those of a debtor and taken as the debtor's. *Lehman v. Kelley*, 68 Ala. 192; *supra*, p. 46, note.

¹ *Stevenson v. White*, 5 Allen, 148; *Nash v. Farrington*, 4 Allen, 157.

² The Pennsylvania cases to the same effect all put the case on this erroneous ground of fraud. *Dieffenderfer v. Fisher*, 3 Grant's Cases, 30; *Gilleland v. Rhoads*, 34 Penn. St. 187; *Strouse v. Becker*, 38 Penn. St. 190; *Emerson v. Smith*, 52 Penn. St. 90. See also *Smith v. Emerson*, 43 Penn. St. 456; *Rose v. Sharpless*, 33 Gratt. 153; *Pratt v. Burr*, 2 Biss. 36; *Cassell v. Williams*, 12 Ill. 387. Indeed the matter of fraud is put on purely moral grounds. 'It is a hard thing doubtless,' says Woodward, J. in *Strouse v. Becker*, *supra*, and the same learned judge delivers the opinion in the other Pennsylvania cases, and always speaks to the same effect, 'it is a hard thing doubtless to be strictly

honest in such an emergency, but it is best after all even for the debtor himself. If his property be taken, his self-respect and conscious integrity are left, and he has gained a moral discipline which will go far towards repairing his fortunes.' This is all very good morals; but the municipal law is not made to teach morality. Most of the Pennsylvania cases *supra* were rightly decided; but the ground taken is mischievous, as is shown in such decisions as that in *Rose v. Sharpless*, *supra*. A very different case is made where the officer takes specifically exempt property because the debtor has kept non-exempt property out of his reach. It is rightly held that the officer is liable in such a case. *Megehe v. Draper*, 21 Mo. 510. Contra, *Emerson v. Smith*, 52 Penn. St. 90. The sheriff is employed to find property that is liable to debt; and he does not discharge his duty by taking something else, especially if he takes it knowing that it is exempt.

the benefit of the exemption law;¹ and this finds some support in the common but inexact and dangerous statement that fraud vitiates everything into which it enters. It may be that a proper construction put upon the language of the exemption statute may justify a rule of forfeiture; but it is difficult to understand how the courts can add to the statute a declaration of the kind. If the statute has given the right absolutely, and has not provided for any forfeiture, it certainly cannot, under any rule of construction, be said that the legislature intended to provide for a forfeiture; and unless it can be clearly shown that the legislature made the law in contemplation of a previous rule or mode of dealing of the courts touching the administration of like legislation, or of some existing law justifying the application of a rule of forfeiture, it is hard to understand how a rule of the kind can be tacked to the statute.² Besides it is an established rule of law that fraud committed *after* the acquisition of a right cannot annul the right, apart from agreement.³

Nor can the case be any better upon the footing of waiver.⁴ If the property is already specifically or directly exempted, the fact that the debtor attempts to conceal it from his creditor can work no waiver, because the concealment would not show, actually or virtually, any purpose to forego the right of exemption, but the contrary, and it would not touch any existing

¹ *Pratt v. Burr*, 2 Biss. 36, citing the Pennsylvania cases supra, and also *Hewes v. Parkman*, 20 Pick. 90. The last case in no way sustains the proposition; it was a case of simple waiver.

² *Crummen v. Bennett*, 68 N. Car. 494. Pearson, C. J.: 'We can see no ground to support the position that an attempt to commit a fraud is a forfeiture of the debtor's homestead; there is no provision of the kind in the Constitution or the statutes.' See also *Cox v. Wilder*, 2 Dill. 45; *Vogler v. Montgomery*, 54

Mo. 577, 584; *State v. Diveling*, 66 Mo. 375.

³ *Stone v. Grubham*, 2 Bulst. 225; *Weller v. Wayland*, 17 Johns. 102; *Sommerville v. Horton*, 4 Yerg. 541; *Fulton v. Loftis*, 63 N. Car. 393; ante, p. 4, note 2. But there may be constructive fraud by 'conduct subsequent.' Ante, p. 4, note 2; vol. 1, p. 384.

⁴ Waiver will not have a retroactive effect, so as to affect exempt property previously aliened. *Wright v. Smith*, 66 Ala. 514.

right of the creditor.¹ A man does not waive a right by trying to hold it.²

The case can seldom be different where the debtor has made a conveyance, with intent to delay or defraud his creditors, to a volunteer or a confederate of a quantity of personalty in one general mass, or a quantity of real estate part of which is exempt in specie or in value.³ Between the creditor and the debtor, whatever may be the case between the debtor and his alienee, every fraudulent conveyance of the debtor, generally speaking, is void and the property is still deemed to be in the debtor as if no transfer had been made, or at least it is so after the transfer has been set aside;⁴ the nature of the property or of the transfer cannot affect the case. It is therefore wrong in principle, and it certainly is mischievous in effect, to hold⁵ that in such a case as that sug-

¹ Waiver is the intentional relinquishment of a known right, or the doing of acts to the detriment of another (i. e. affecting his existing rights) on account of which it would be unjust to the latter to permit the assertion of the right. As to the latter kind of waiver see Bigelow, Estoppel, 633-641, 4th ed.

² Patten v. Smith, 4 Conn. 450, 455.

³ As where a debtor makes a 'fraudulent' conveyance of his dwelling-house, worth \$1,500, which was an exempt homestead to the amount of \$1,000. See Pike v. Miles, 23 Wis. 164; Ferguson v. Kimber, 27 Minn. 156; s. c. 25 Minn. 183; Matson v. Melchor, 42 Mich. 477; Edmonson v. Meacham, 50 Miss. 34, 51; Marshall v. Sears, 79 Va. 49; Wood v. Chambers, 20 Texas, 247, 254; Muller v. Inderreider, 79 Ill. 382; Sears v. Hanks, 14 Ohio St. 298; Buck v. Ashbrook, 59 Mo. 200; Bolling v. Jones, 67 Ala. 508. A good illustration may also be seen in Danforth v. Beattie, 48 Vt. 138, where a mortgage

contained an exempt homestead and other land not exempt. A good example of personalty may be seen in Anderson v. Odell, 51 Mich. 492. Against the text see Sugg v. Tillman, 2 Swan, 208, personalty in a mass. And see Rose v. Sharpless, 33 Gratt. 153, ante, p. 56. But with the first of these two cases compare the later Tennessee case of McCord v. Moore, 5 Heisk. 734.

⁴ Sears v. Hanks, 14 Ohio St. 298; McFarland v. Goodman, 6 Biss. 111, 116; Cox v. Wilder, 2 Dill. 45; Smith v. Kehr, ib. 50, 63, 64; Vogler v. Montgomery, 54 Mo. 577, 584. See Thomason v. Neeley, 50 Miss. 210; Shaw v. Millsaps, ib. 380.

⁵ As was held in Huey's Appeal, 29 Penn. St. 219, approved in Dieffenderfer v. Fisher, 3 Grant's Cas. 30. In the latter case it was held that the debtor had made his claim too late. Sed quære. See Sears v. Hanks, 14 Ohio St. 298; Miller v. Sherry, 2 Wall. 237.

gested the debtor has waived, forfeited, or lost his right to the benefit of the exemption, unless that is manifestly the meaning of the exemption law,¹ or unless it is now too late by that law for the debtor to claim the benefit. When the debtor's transfer is annulled, the exemption should be allowed, if demanded.²

Other reasons not touching the question of construction either of the statute of Elizabeth or of the exemption laws fortify these considerations, not the least of which is this: The creditor is compelled to treat the transfer as invalid, — as not affecting his rights, — as if it had not been made; but if it had not been made, he could have had no claim upon the actually exempt property. Can he then treat the transfer as invalid against his rights and yet as having conferred rights upon him? This reasoning has been taken in some of the cases.³ Thus in the first case cited it was held that creditors, after having had a deed of their debtor set aside as in fraud of their rights, could not upon execution under the decree set up the deed as a bar to the debtor's assertion of his right to have a homestead reserved out of the sale.

Similar considerations touch the question of rights of dower in non-exempt lands conveyed by a debtor in fraud of his creditors; the widow will be entitled to her dower if the conveyance is annulled. And the same grounds may be taken as in regard to the foregoing cases; (1) the statute of Elizabeth cannot be construed as enlarging the rights of creditors;

¹ See *Currier v. Sutherland*, 54 N. H. 475, 486, 487, and *Edmonson v. Meacham*, 50 Miss. 34, among other cases, as to the necessity of continued occupancy, to which a transfer has put an end. But that cannot be material in favor of a creditor who treats the transfer as void; no one may blow hot and cold at the same time.

² See cases in note 3, p. 64. If the

debtor does not demand it, his grantee cannot. *Currier v. Sutherland*, 54 N. H. 475.

³ *Sears v. Hanks*, 14 Ohio St. 298; *Cox v. Wilder*, 2 Dill. 45; *McFarland v. Goodman*, 6 Biss. 111, 115. So in cases of dower in conveyances in fraud of creditors. *Robinson v. Bates*, 3 Met. 40, 42; *Richardson v. Wyman*, 62 Maine, 280.

(2) the deed must be treated by the creditors as invalid, and the title being considered back (or still) in the debtor, the wife's right of dower attaches as if nothing had been done; (3) creditors cannot treat the deed as invalid against themselves and as at the same time conferring rights upon them.¹ It follows that, so far as the matter stands between creditors and the widow of the grantor, she is entitled to her dower notwithstanding the fact that she released the same when her husband conveyed.² Nor in principle can it make any difference that the wife may have participated in her husband's purpose to delay or defraud his creditors; though it may be that the Pennsylvania courts would not agree to this.³ Of course if the conveyance in fraud of creditors was made before the marriage the widow cannot claim dower upon the creditors' impeachment of the deed.⁴

In some of the authorities the question of the widow's rights has been complicated by other facts. Thus the husband has in the first place made or caused to be made a conveyance of the property in question to his wife, and then both together have conveyed to a third person; or the husband has conveyed to a third person, the wife releasing dower, and then the grantee has reconveyed the estate to the wife; — both conveyances being afterwards set aside as in fraud of the husband's creditors. In such cases it has been argued that there has been

¹ See the last two cases cited.

² *Robinson v. Bates*, 3 Met. 40; *Richardson v. Wyman*, 62 Maine, 280; *Woodworth v. Paige*, 5 Ohio St. 70; *Mattill v. Baas*, 89 Ind. 220; *Ketchum v. Schicketanz*, 73 Ind. 137; *Munger v. Perkins*, 62 Wis. 499; *Malloney v. Horan*, 49 N. Y. 111; *Porter v. Lazear*, 109 U. S. 84; *Lowry v. Fisher*, 2 Bush, 70, 78; *Dugan v. Massey*, 6 Bush, 81; *Lockett v. James*, 8 Bush, 28; *Cox v. Wilder*, 2 Dill. 45; *Blain v. Harrison*, 11 Ill. 384; *Morton v. Noble*, 57 Ill. 176; *Summers v. Babb*, 13 Ill. 483.

³ Would the Pennsylvania courts hold that dower was only for honest widows? Dower in this connection is sometimes compared with rights of exemption; but the resemblance is very superficial.

⁴ *Whithed v. Mallory*, 4 Cush. 138; *Gross v. Lange*, 70 Mo. 45. So where a conveyance is made for the purpose of defeating an intended wife of dower. *Jones v. Roberts*, 65 Maine, 273, citing *Baker v. Chase*, 6 Hill, 482, and *Rowland v. Rowland*, 2 Sneed, 543. See however *King v. King*, 61 Ala. 479.

a merger in the wife, by the conveyance to her, of her dower in the fee; the dower right thus being lost, and not being revived by the act of the creditor in procuring the conveyances to be set aside. But the courts have answered this specious reasoning by showing that there can be no merger where the estates are not concurrent but successive, or where the greater estate is invalid and is subsequently avoided.¹

The question whether the widow can claim dower against the *grantee* in a fraudulent conveyance by her husband with release of dower is not so easily disposed of; though courts have not hesitated to pronounce in her favor on this question as well as on the questions just referred to.² One serious difficulty in the way of the rule is that the widow is estopped by her release of dower to claim against her releasee;³ that is, she has solemnly parted with her interest, and though her act does not operate by way of grant, it operates just as effectually against her by estoppel. Now it is no answer to this, it seems, that the husband's conveyance was in fraud of his creditors and that the grantee is a volunteer or a participant in the fraud, unless misrepresentation or some other kind of fraud was practised upon the wife. If she was imposed upon by fraud in the transaction, her release is not binding; if she was not, the mere fact that creditors have had the deed set aside cannot help her against the *grantee*.

When it is said that creditors may procure the conveyance to be annulled, the meaning is, annulled so far as their rights are concerned, not annulled for all purposes. The conveyance

¹ Richardson v. Wyman, 62 Maine, Dill 40, 45; Robinson v. Bates, 8 Met. 230; Mallory v. Horan, 12 Abb. Pr. 40, 42. In the last case the question is not stated.

² Lockett v. James, 8 Bush, 28; ³ Cox v. Wilder, supra; Stearns v. Woodworth v. Paige, 5 Ohio St. 70, Swift, 8 Pick. 532; Usher v. Richardson, 29 Maine, 415; Farley v. Eller, 29 Ind. 322. See Lothrop v. Foster, 51 the widow. But see Cox v. Wilder, 2 Maine, 367.

is good between the grantor and his grantee,¹ though without consideration; and if the wife, not herself being the victim of any fraud, has lawfully released dower, the conveyance must be good against her.² If the deed has not been disturbed by the husband's creditors,³ the case of the widow's claims against the grantee becomes still more doubtful. The situation between the widow and a later grantee of the dowable land sold on behalf of the husband's creditors would be quite different. Such grantee would take under the debtor, and not under the prior fraudulent conveyance, and thus the claim of the widow, now relieved of the estoppel, would be let in.

§ 5. CHOSSES IN ACTION: LORD HARDWICKE AND LORD THURLOW.

The words 'lands and tenements,' and 'goods and chattels,' have been the subject of special examination without regard to exemption laws, dower, or the like matters considered in the pages preceding. Apart from the cases just under consideration does the statute of Elizabeth, as construed, cover

¹ Vol. 1, pp. 206, 207; *Zuver v. Clark*, 104 Penn. St. 222; *Bonesteel v. Sullivan*, ib. 9; *Harvey v. Varney*, 98 Mass. 118; *Brown v. Thayer*, 12 Gray, 1; *Perry v. Hayward*, 12 Cush. 344; *Murphy v. Marland*, 8 Cush. 575, 577; *Waterbury v. Westervelt*, 9 N. Y. 598; *York v. Merritt*, 80 N. Car. 285; *Roberts v. Lund*, 45 Vt. 82; *Horn v. Star Foundry Co.* 23 W. Va. 522; *Davy v. Kelley*, 66 Wis. 452, and cases cited; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Schuman v. Peddicord*, 50 Md. 560; *Butler v. Moore*, 73 Maine, 151; *Curtis v. Price*, 12 Ves. 103, 106; *Bessey v. Windham*, 6 Q. B. 166; *Robinson v. McDonel*, 2 Best & S. 134; *Smith v. Cherrill*, L. R. 4 Eq. 390; *Tanqueray v. Bowles*, L. R. 14 Eq. 151, 157;

French v. French, 6 De G. M. & G. 95, 103. In *Curtis v. Price* Sir Wm. Grant said of a voluntary settlement: 'A settlement of this kind is void only as against creditors; but only to the extent in which it may be necessary to deal with the estate for their satisfaction, it is as if it had never been made. To every other purpose it is good. Satisfy the creditors, and the settlement stands.' The conveyance is also good between either party and a stranger. *Bessey v. Windham*, supra. Or against the assigns of the parties. *Robinson v. McDonel*, supra. So of an assignment of goods. *Bessey v. Windham*, supra.

² Vol. 1, p. 253.

³ As in *Woodworth v. Paige*, supra.

all kinds of property?¹ Since the passage of the statute there has been much change in the law in regard to property subject to the claims of creditors. Copyholds, choses in action, and money, formerly beyond the reach of creditors are now within their reach; while the statute of Elizabeth remains unchanged. How has the change operated in regard to that statute?

The words above quoted do not stand alone; the statute prohibits alienations with 'intent to hinder, delay, or defraud creditors.' Now these latter words are just patent of a meaning different from that of such words as 'alienations in fraud of creditors;' and we have seen that some courts have, in point of fact, acted upon such an idea, overturning alienations made by debtors with intent to hinder or defraud their creditors where the property conveyed was not otherwise subject to the claims of creditors. The matter was taken literally; creditors may not have been defrauded because they had no rights in respect of the property, but there was an 'intent' to defraud them, and that was enough. We have seen that this view still obtains in some courts, in its application to exemption laws.

There is just as much, and just as little, ground for applying this view of the statute generally as for applying it to cases of alienation of property exempted by law from the claims of creditors. Choses in action furnish a case in point. Assuming that these were beyond the reach of creditors in the hands of their debtors, as they formerly were, would a transfer of such property by a debtor with intent to defraud his creditors be within the statute of Elizabeth?² In the

¹ An author may transfer his unpublished manuscripts with intent to defeat his creditors, because they could not be reached in the hands of the author himself. *Dart v. Woodhouse*, 40 Mich. 399; ante, p. 41, note.

² Copyholds furnish another case in

point. These were not in the time of Sir Lloyd Kenyon subject to the claims of creditors; upon alienation with intent to defraud, were they within the statute of Elizabeth? It was held they were not. *Mathews v. Feaver*, 1 Cox, 278. They are now liable to execution, and

time of Lord Hardwicke the Court of Chancery did not hesitate to give the creditor its aid in such cases ; in the time of Lord Thurlow the Court of Chancery pointedly refused to do so, and Lord Thurlow effectually turned the tide against his greater predecessor.

What is the explanation? Was there a conflict between Lord Hardwicke and Lord Thurlow in regard to the construction, or the principle of construction, of the statute of Elizabeth? Did Lord Hardwicke affirm and Lord Thurlow deny the rule of liberal construction, or its application to the case? Fortunately these questions can be answered in the negative. 'Fortunately,' we say, for it would be a serious matter if it should appear that the rule, or even its application, had been doubtful and unstable, as indeed a first glance, nay, the very language sometimes of the courts,¹ might lead us to infer. The case at bottom stands thus:—

Sir Wm. Fortescue,² Lord Hardwicke,³ and Lord Northington,⁴ all held that choses in action (Lord Northington holding it, rather, of money,⁵ which stood upon the same footing), though not liable to execution at law or in equity, were capable of being reached in equity, and hence could be pursued by creditors into the hands of volunteers, purchasers with notice, or fraudulent grantees.⁶ None of these judges said that the statute of Elizabeth had enlarged the substantive rights of creditors. Sir Wm. Fortescue said indeed that it was a standing rule of the court that transfers of choses in action with intent to hinder creditors were 'always looked upon as fraudulent and within' the statute of Elizabeth; but he said nothing to indicate that this was matter of construc-

the statute opens to receive them. May, *Fraudulent Conveyances*, 18, 2d ed. But copyholds were not the subject of controversy, as were choses in action.

¹ See *infra*, p. 73, note.

² *Taylor v. Jones*, 2 Atk. 600 (1748).

³ *King v. Dupine*, 2 Atk. 608, note (1744).

⁴ *Partridge v. Gopp*, 1 Eden, 163; s. c. 2 Amb. 596 (1758).

⁵ *Partridge v. Gopp*, *supra*.

⁶ It mattered not whether the creditor had a lien. *Taylor v. Jones*, *supra*.

tion, and his statement probably means that it was a rule of the court that choses in action could be subjected to the claims of creditors.

The case decided by Lord Hardwicke, just cited, may be stated with profit. D was entitled to the reversion of four annuities, after the deaths of certain persons; the annuities being vested in trustees for all the parties interested. The plaintiff having obtained a judgment at law against D, now filed her bill against him and the trustees and others. After answer she filed a supplemental bill, stating that a fieri facias had been issued upon her judgment, and that the sheriff had seized the reversion of the annuities, and had made an assignment of them to W in trust for herself; that wishing to have the assignment registered, she had applied to the proper officer, who refused her request on the ground that she had not acquired the right. The bill therefore prayed that the plaintiff might have the reversion of the annuities sold and her judgment satisfied out of the proceeds. The defendants submitted whether the sheriff could seize the reversion and make the assignment. Lord Hardwicke decreed that the bill should be taken for confessed against D, and that the trustees and W should assign all the reversionary interest in the annuities to the plaintiff. There is no mention of the statute of Elizabeth in the case; it clearly was not a case of construction.

Another case¹ before Lord Hardwicke may be stated. Judgment on a bond for £1,500 had been rendered, and the sheriff had returned 'nulla bona.' Thereupon the plaintiff brought a bill to have satisfaction out of certain stocks held by trustees for the defendant. Had the plaintiff gone no further, his bill to subject the stock would, the reporter adds in a 'N. B.,' have been proper; but he took out a capias ad satisfaciendum, and Lord Hardwicke held that this amounted to a satisfaction of the debt which equity would not disturb. Nothing is said about the statute of Elizabeth.

¹ *Horn v. Horn*, 1 Amb. 79 (1749).

In the face of these cases one may well marvel to hear Lord Thurlow ask, 'Is there any case where a man having stock in his own name has been sued for the purpose of having it applied to satisfy creditors?'¹ But it must not be supposed that Lord Thurlow took some special view of the construction of the statute. He said nothing about that, but took the position that choses in action could not be reached by creditors either at law or in equity; the courts could not touch or apply anything that could not be reached in the hands of the debtor by process of execution.

The statute had not enlarged the rights of creditors; and the result followed of course that a debtor could dispose of his choses in action at pleasure, whatever his purpose. He might give them away though himself insolvent; he might lay them out in the purchase of property for another; he might dispose of them with intent to defraud his creditors; nothing of the kind was prohibited by the statute, for nothing of the kind could prejudice his creditors.² The property was exempt at law and in equity. One exception or qualification to the rule was admitted; during the lifetime of the debtor choses in action could not be reached, but after his death it was conceded to be otherwise. Then his creditors might reach all his personal property of every kind, under the jurisdiction of equity for the administration of estates.³

The same result, it may be remarked, came about under the old English bankruptcy and insolvent debtors' acts, in regard to choses in action, during the *lifetime* of the debtor. Under

¹ *Dundas v. Dutens*, 1 Ves. jr. 196 (1790). Jac. 1, c. 15. *Ex parte Shorland*, 7 Ves. 88; *Ex parte Smith*, 1 Rose, 210;

² *Dundas v. Dutens*, *supra*; *Rider v. Kidder*, 10 Ves. 360; *Sims v. Thomas*, 12 Ad. & E. 536; *Norcutt v. Dodd*, Craig & P. 100; *McCarthy v. Goold*, 1 Ball & B. 387; *Murphy v. Marland*, 8 Cush. 575. So in regard

to money; and that was not 'goods and chattels' within the Bankruptcy Act, 1

³ *Norcutt v. Dodd*, Craig & P. 100; *Rider v. Kidder*, 10 Ves. 360, 369.

these acts it was uniformly held that all the property of the debtor, including choses in action, was applicable to the payment of his debts.¹ Yet these statutes had made use of the same words 'goods and chattels' used in the statute of Elizabeth; so that a creditor in bankruptcy proceedings had for a time greater rights than a creditor as creditor.

In regard to the statute of Elizabeth however Lord Thurlow would probably have agreed with Lord Hardwicke that the statute should be liberally construed; neither judge in point of fact spoke of construction or interpretation. So far as any question of construction was involved in the case before Lord Thurlow,² the rule might have been stated in language to which Lord Hardwicke would not have objected, to which rather he would have entirely assented; to wit, that the words 'goods and chattels,' in view of their connection, referred to personalty which a creditor could reach, and that only. Lord Hardwicke said that choses in action *could* be reached by creditors, and he showed how;³ Lord Thurlow said they were exempt.⁴

¹ Norcutt v. Dodd, Craig & P. 100.

² Dundas v. Dutens, 1 Ves. jr. 196.

³ So in Penrod v. Morrison, 2 Penn. 130: 'Although Mitchell could not collect his debt by fieri facias and levy, as a chose in action is not the subject of execution, yet satisfaction might have been obtained by compelling Morrison to assign for the benefit of creditors.' Rogers, J. quoted in Elliott's Appeal, 50 Penn. St. 75.

⁴ There is reason to think that it is in part at least due to a confusion upon this point that Lord Thurlow came to be followed in England; the earlier rule being taken for a rule of construction, and so was held unsound. Fortescue, M. R. said in Taylor v. Jones, 2 Atk. 600, 601, that a gift of stock was 'within 13 Eliz. c. 5;' which is perfectly true if stock in the hands of the *debtor* could be reached,

of which he says nothing. But the language of the court caused Lord Eldon to say that the M. R. got at stock through a doctrine 'very difficult to maintain.' Rider v. Kidder, 10 Ves. 360, 369. That is, it seems, Lord Eldon supposed that Sir Wm. Fortescue had treated stock, before beyond the reach of creditors, as brought within their reach by the statute of Elizabeth; a construction 'difficult to maintain.' So later Lord Denman, speaking of a transfer of bonds, more clearly still says: 'The question is whether they are "goods and chattels" within the meaning of stat. 13 Eliz. c. 5.' And 'Lord Eldon appears to have been of opinion that stock was not within the statute of Elizabeth.' Sims v. Thomas, 12 Ad. & E. 536, 554. Whereas the true question was, whether bonds in the hands of a debtor were in

Lord Hardwicke then did not hold that the statute could be construed as creating new substantive rights; though it is plain in principle that it did authorize any remedy, though new,¹ necessary to make it effectual. No judge entitled to speak with anything more than local authority has ever held that the statute of Elizabeth conferred any right of substantive law upon a creditor against his debtor's assignee or transferee² which the creditor did not have against his debtor.

The existing law of England, under which creditors may *any way* liable for debt; if they were not, of course they were not within the statute of Elizabeth.

Our courts too have sometimes misunderstood the matter, from the opposite point of view, supposing that Lord Thurlow laid down a narrow and therefore erroneous rule of construction. In *Catchings v. Manlove*, 39 Miss. 655, the court says: 'The statute has generally received a liberal construction . . . ; but to restrict its operation to cases of fraudulent gifts and conveyances of such property as might be seized under execution would be to destroy its beneficial effect.' See also *Pinkerton v. Manchester R. Co.* 42 N. H. 424 ('We are satisfied that' stock 'comes within the provisions of the statute of 13 Eliz. c. 5'); *Elliott's Appeal*, 50 Penn. St. 75 ('"Goods and chattels" include life insurance policies').

It is a matter only of historical interest whether in the time of the statute itself choses in action and money could be reached by creditors, without the process of outlawry. It was a 'standing rule' of equity in Lord Hardwicke's time, as we have seen, that such property could be subjected to debts; but how long standing? This we do not know; but it may be not without point to refer to the statute of 50 Edw. 3, quoted ante, p. 21, in which we are told in picturesque language that debtors who had inherited

property were wont, after having given 'all their tenements and chattels to their friends,' to betake themselves to privileged places and there live 'in great state on *other* goods.' The place protected the debtor from arrest; the 'other goods' were apparently exempt, certainly beyond reach, — what were they? Evidently not beasts of the plough or implements of industry. Perhaps they were only the borrowed goods of the 'friends,' still the property of the lenders, though that does not seem probable.

¹ As to changes in the law in mere modes of relief, the English Court of Chancery has said: 'We think that it makes no difference that by a subsequent improvement or alteration in the law a better or more effectual or a different mode of affecting the property by way of execution has been created, or that the plaintiff has resorted to it rather than to the mode which was alone in force when the deed was executed.' Knight Bruce, L. J. in *Blenkinsopp v. Blenkinsopp*, 1 De G. M. & G. 495.

² That is, apart from the very fact that the creditor had a right under the statute to proceed against the transferee; whether that was a new right at all was considered in the preceding chapter.

annul alienations of choses in action by a debtor, is due immediately to statute,¹ by which choses in action (such as bonds² and bank notes,³ bills of exchange and promissory notes⁴ and other securities,⁵ shares of stock⁶) and money,⁷ are made liable to execution; the statute of Elizabeth opening accordingly. But this is itself a matter of interest in the study of the rule of construction. It was not necessary to amend that statute; the rule was that creditors could pursue property which was subject to execution, and the statute of Elizabeth opened of itself to the benefits created. The principle suggested is general.⁸

In this country too, it is hardly necessary to say, choses in action are almost everywhere subject to the claims of creditors.⁹ In some states, as in New York, the result was reached without the aid of legislation, under the influence of the opinion of Chancellor Kent;¹⁰ in others, and more generally, the question has been set at rest by legislation.¹¹ But the result

¹ 1 & 2 Vict. c. 110.

² Bonds were not within the law so late as the time of Lord Denman. *Sims v. Thomas*, 12 Ad. & E. 536.

³ 1 & 2 Vict. c. 110.

⁴ *Edwards v. Cooper*, 11 Q. B. 83.

⁵ 1 & 2 Vict. c. 110.

⁶ Under insolvency laws, where stock was held 'goods and chattels.' *Ex parte Vallence*, 2 Deac. 354; *Brown v. Bel-laris*, 5 Madd. 53.

⁷ *Barrack v. McCulloch*, 3 Kay & J. 110. Contra in Lord Eldon's and Lord Ellenborough's time. *Ex parte Shorland*, 7 Ves. 88; *Ex parte Smith*, Rose, 210; *Kensington v. Chantler*, 2 Maule & S. 36. Contrary to the older cases, money may now be followed, though it has no ear-mark. *Knatchbull v. Hall-lett*, 13 Ch. D. 696.

⁸ Choses in action received as the proceeds of a fraudulent conveyance may be taken by the grantor's creditors. *Barrack v. McCulloch*, 3 Kay & J. 110,

117, 118; *French v. French*, 6 De G. M. & G. 95.

⁹ In Indiana the courts have followed the rule of Lord Thurlow. *Keightley v. Walls*, 27 Ind. 384; *Scott v. Indianapolis Wagon Co.* 48 Ind. 75.

¹⁰ *Bayard v. Hoffman*, 4 Johns. Ch. 452. In this case all the authorities are reviewed, but it was not necessary to decide the question. Chancellor Kent clearly indicated his preference for the old English rule. Shortly afterwards he ruled accordingly; and his decision was affirmed by the Court of Errors. *Hadden v. Spader*, 20 Johns. 554, subjecting stock to the claims of creditors. See also *Drake v. Rice*, 130 Mass. 410; *Catchings v. Manlove*, 39 Miss. 655.

¹¹ In some states, as in Massachusetts, legislation was necessary because of the want of any general jurisdiction in equity. See such cases as *Howe v.*

has generally been reached on the one hand without straining the rule of construction and on the other without legislative enlargement of the statutes against fraudulent conveyances. Those courts which have followed Chancellor Kent have held, with Lord Hardwicke and his contemporaries, that equity could subject choses in action, though it could not reach them by execution; the courts of states in which the subjects of execution have been enlarged by statute have held, as in England, that this was enough to open the statute of Elizabeth.

But the matter has not stopped here. It is held not only that equity will subject choses in action in general, but that it will subject new kinds of choses, unknown in the time of Elizabeth. A striking example of this is furnished by the case of life insurance policies; it is well settled that where these are payable to the debtor and his representatives only, equity has jurisdiction to reach them and to follow them into the hands of a voluntary assignee, or an assignee with notice of the debtor's insolvency.¹ The rule appears to be different where the policy runs in favor of another, as the wife or children of the debtor,² especially under statutes,³ or where

Bishop, 3 Met. 26, 28; *Murphy v. Marland*, 8 Cush. 575, 577; *Hamilton v. Cone*, 99 Mass. 478. But now see Pub. Sts. of Mass. c. 172, § 1; *Hamilton v. Cone*, supra; *Drake v. Rice*, 130 Mass. 410. Further see 1 Story's Equity, pp. 26-29, 13th ed. as to changes generally in equity jurisdiction.

¹ *Catchings v. Manlove*, 39 Miss. 655; *Burton v. Farinholt*, 86 N. Car. 260; *Elliott's Appeal*, 50 Penn. St. 75. But the rule was improperly treated as one of construction in the first and last of these cases. Life insurance policies may now be reached in England also. *Freeman v. Pope*, L. R. 9 Eq. 206; s. c. 5 Ch. 538; *Stokoe v. Cowan*, 29 Beav. 637; *Law v. Indisputable Assur. Soc.* 1 Kay & J. 223; *Robson v. Mc-*

Creight, 25 Beav. 272; *Taylor v. Cornen*, 1 Ch. D. 636. Contra, it seems, before 1 Vict. c. 110, § 12. *Stokoe v. Cowan*, supra; *Grogan v. Cooke*, 2 Ball & B. 230, 233. But under the construction put upon that Act the statute of Elizabeth opens to receive them. See *Stokoe v. Cowan*. Further see *Chapman v. McIlwrath*, 77 Mo. 38.

² *Elliott's Appeal*, supra.

³ See Mass. Pub. Sts. c. 110, § 167; *Swan v. Snow*, 11 Allen, 224; *Gould v. Emerson*, 99 Mass. 154; *Knickerbocker Life Ins. Co. v. Weitz*, ib. 157; *Wason v. Colburn*, ib. 342; *Unity Life Assur. Assoc. v. Dugan*, 118 Mass. 219. In Maryland see *Earnshaw v. Morton*, 64 Md. 513. See also *Elliott v. Bryan*, 64 Maine, 368; *Fearn v. Ward*, 65 Ala.

the policy was assigned in good faith before insolvency, as a reasonable provision.¹

§ 6. INTENT TO DEFRAUD.

The third general question proposed,² touching the rule of construction, was of the meaning of the word 'intent,' in the expression 'intent to delay, hinder, or defraud creditors and others,' and whether upon the natural assumption that the word was used in its primary and obvious sense by those who put it into the statute, it may not have undergone some change of meaning in the course of time. Here we have a real and a very important question of the application of the rule of construction.

One phase of this question has received an answer which at first, and taken by itself, might challenge attention; though what at first might appear remarkable finds presently a satisfactory explanation. There is a large class of cases falling under the influence, though not under the language until recent times, of bankruptcy laws, in which conveyances, transfers, and payments by debtors to any of their creditors, even when made with express intent to defeat other creditors equally entitled to payment, have from the beginning been treated as not within the statute of Elizabeth.³ If one went

33; *Stone v. Knickerbocker Life Ins. Co.* 52 Ala. 589; *Continental Life Ins. Co. v. Webb*, 54 Ala. 688. The Alabama cases relate to or consider limitations of amount which the husband may by statute lay out in premiums. In *Fearn v. Ward* the case was held to fall without the statute because the insurance, instead of being procured in favor of the wife and children, was procured in favor of one of several children.

¹ *Chapman v. McIlwrath*, 77 Mo. 38.

² Ante, p. 42.

³ *Wood v. Dixie*, 7 Q. B. 892; *Darvill v. Terry*, 6 Hurl. & N. 807; *Shelley v. Boothe*, 73 Mo. 74; *Dudley v. Danforth*, 61 N. Y. 626; *Wilson v. Berg*, 88 Penn. St. 167 (but see *Ferris v. Irons*, 83 Penn. St. 179); ante, p. 7, n.; post, p. 79, n. The text refers to cases in which one creditor is by an absolute transfer preferred to another, with nothing more than a simple intent, however plain and actual, to defeat the latter. If the preference is upon trust for the benefit, in part, of the debtor, or if it gives or professes to

no further than the statute itself, one might well suppose that here the doctrine of liberal construction had been rejected. Why, it might naturally be asked, were such cases relegated to bankruptcy laws, nay to actual proceedings in bankruptcy or winding-up,—for even the bankruptcy laws do not meet these cases except in bankruptcy proceedings?¹ There is nothing in the statute of Elizabeth to require the courts to hold that it has no application to such cases; and yet it has always been held that the statute of Elizabeth was not a statute touching bankruptcy or insolvency.

The explanation of the apparent anomaly sometimes given, that a debtor ought to have the right to pay creditor A in preference to creditor B, if he choose to do so, is not satisfactory; for that is virtually saying that the debtor may defraud

give to the preferred creditor more than his due, and in that way serves to defeat the rest, the transaction assumes a different aspect altogether, and is invalid towards them. *Harris v. Sumner*, 2 Pick. 129; *Crowninshield v. Kittridge*, 7 Met. 520; *Seaman v. Nolen*, 68 Ala. 463; *Crawford v. Kirksey*, 55 Ala. 282; *Young v. Dumas*, 39 Ala. 60; *Thompson v. Furr*, 57 Miss. 478; *McVeagh v. Baxter*, 82 Mo. 518; *Holmes v. Braidwood*, ib. 610; *Olmsted v. Mattison*, 45 Mich. 617; *Dyer v. Rosenthal*, ib. 588; *Alton v. Harrison*, L. R. 4 Ch. 622. That a valid conveyance may be made to one creditor, with intent to defeat another, is peculiar to the law of preference; the grantee must be a creditor.

The brief report of *Dudley v. Danforth*, supra, seems to imply that if the creditor participated in the debtor's purpose to defeat his other creditors, the transfer would be invalid on his part. That is true under insolvency laws, but not under the statute of Elizabeth. Indeed under the English

bankruptcy laws it would be enough that the creditor knew of his debtor's purpose. See post, Chapter on Fraudulent Open Preference. Such cases must not be confounded with cases of subsequent purchases from one who had before made a voluntary conveyance of the premises. *Hill v. Ahern*, 135 Mass. 158. These latter fall under 27 Eliz. c. 4.

There are thus three classes of cases, to be carefully distinguished: 1. Fraudulent conveyance by a debtor to one not his creditor. This falls under 18th Eliz. c. 5. 2. Voluntary conveyance, followed (or preceded) by a bona fide conveyance of the same premises, for valuable consideration. This falls under 27 Eliz. c. 4. 3. Conveyance by a debtor to his creditor by way of preference. This falls under bankruptcy and insolvency laws. The first of these cases is the subject for consideration in this section.

¹ *Willmott v. London Celluloid Co.* 34 Ch. D. 147, C. A.; *Burt v. Perkins*, 9 Gray, 317.

B.¹ The true explanation appears to be that there existed already, at the time the statute of Elizabeth was passed, an Act of Bankruptcy, and that another Act of the kind was passed in the very same year with our statute. Questions of preference of course fell within these other statutes.² Still there is reason to regret that the statute of Elizabeth was not so construed as to cover all cases of bankruptcy not deemed to be covered by the bankruptcy laws, such as preferences by an insolvent arising in other proceedings than those of bankruptcy or winding-up. Was the rule of liberal construction overlooked here? Or was it that the injured creditor had missed his forum or remedy, and that construction would not reach the case?

Excluding then, as we must, cases falling under the general head of fraudulent preference, we are left with the question whether the word 'intent' in the phrase 'intent to delay, hinder, or defraud' is to be taken in the ordinary sense, so that cases in which there is in point of fact no purpose to delay or defraud fall without the statute; or is 'intent' to be taken in some other sense, and if so, what? In a word is the rule of

¹ See ante, p. 7, note.

² 34 & 35 Hen. 8, c. 4; 13 Eliz. c. 7. 'It is obvious,' said Fry, J. in *In re Johnson*, 20 Ch. D. 389, 'that the intent of the statute is not to provide equal distribution of the estates of debtors and their creditors; there are other statutes which have that object.' If this is the true explanation, the course of the courts in this country upon the subject is open to question. In the absence of bankruptcy or insolvency laws the statutes against fraudulent conveyances might well have been construed to meet the case; and there is reason to think it unfortunate that our courts were misled. In Pennsylvania it has been laid down that a

preference given with intent to defraud is unlawful, though without such intention it would be valid. *Ferris v. Irons*, 83 Penn. St. 179, quoting *Gibson, C. J. in Gans v. Renshaw*, 2 Barr, 34. But see *Wilson v. Berg*, 88 Penn. St. 167, 172, where it is said that a debtor may, 'except as against a bankrupt law,' prefer any of his creditors, though he may thereby hinder the rest. This may not mean that the preference may be made with intent to hinder. But the proposition in *Gans v. Renshaw* is stated with regard to sales to the creditor, which is not quite the same thing as an ordinary preference. See the distinctions *supra*, p. 78, note, and *post*, p. 104, note.

liberal construction applicable; if it is, how in fact has it been applied?

It should be observed at the outset that wherever there is an intent, in point of *fact*, to delay or defraud on the part of the debtor, a gift or even a conveyance for value with notice, not being made to a creditor by way of preference, will be within the statute of Elizabeth; and this regardless of the effect produced upon the debtor's estate. That the debtor has other property subject to the claims of creditors is, at all events under the statute of Elizabeth, quite immaterial; the conveyance is invalid and may be set aside.¹ Cases of actual

¹ Gormley v. Potter, 29 Ohio St. 597; Botsford v. Beers, 11 Conn. 369; Weightman v. Hatch, 17 Ill. 281; Vasser v. Henderson, 40 Miss. 519; Wadsworth v. Schissebauer, 32 Minn. 84; Lehman v. Meyer, 67 Ala. 396 (st.); Hagar v. Schindler, 29 Cal. 47. Contra Napper v. Yager, 79 Ky. 241; Crim v. Walker, 79 Mo. 335; Lewis v. Lamphon, 79 Ill. 187; Stevens v. Works, 81 Ind. 445; McCole v. Loehr, 79 Ind. 430; Cox v. Hunter, ib. 590; Noble v. Hines, 72 Ind. 12; Bruker v. Kelsey, ib. 51; Pfeifer v. Snyder, ib. 78; Emery v. Yount, 7 Col. 107; Smith v. Newton, 62 Miss. 230; Strong v. Lawrence, 58 Iowa, 55; Hunt v. Warner, 39 Ark. 70; Oliphant v. Hartley, 32 Ark. 465; Sale v. McLean, 29 Ark. 612. Suits to set aside fraudulent conveyances should not be confounded, as they have been apparently in some of these cases, with suits in which a creditor seeks to reach equitable assets of his debtor. In these latter suits the creditor is generally required to show that he has exhausted his legal remedies without satisfaction; for until then, the creditor has a remedy at law. The distinction is well shown in Wadsworth v. Schissebauer, *supra*. See Reed v. Wheaton, 7 Paige, 663; Preston v. Colby, 117 Ill. 477. In some courts it

is held that even in suits to set aside fraudulent conveyances by the debtor an execution should first have been issued and returned 'nulla bona,' and the suit then be brought in aid of the execution. Adsit v. Butler, 87 N. Y. 585. See Mathews v. Mobile Ins. Co. 75 Ala. 85. See contra, Wadsworth v. Schissebauer, *supra*, in which it is said: 'The better rule is that the creditor need only proceed at law far enough to acquire a lien upon the property sought to be reached, before filing his bill to set aside a fraudulent conveyance. The extent to which he must proceed to do this will depend on the nature of the property. If it be personal, there must be a levy, for until this is made he has no lien. If it be real estate, it is enough to obtain judgment and docket it in the county where the lands are situated.' Many cases are cited, among them, Weightman v. Hatch, 17 Ill. 281; Newman v. Willetts, 52 Ill. 98; Vasser v. Henderson, 40 Miss. 519; Tappan v. Evans, 11 N. H. 311; Cornell v. Radway, 22 Wis. 260; Clarkson v. De Peyster, 3 Paige, 320; Dunham v. Cox, 10 N. J. Eq. 437, 466. So Fleming v. Grafton, 54 Miss. 79; Jones v. Green, 1 Wall. 330, 332.

In Goodman v. Wineland, 61 Md. 449, the court says: 'If it should ap-

intent fall within the very language of the law.¹ And whether the person to be delayed or defrauded is a present creditor or claimant, or is afterwards to become such, even for an unknown amount, is in such a case immaterial.²

The question for consideration may arise in one of three ways: first, — and it more frequently arises in this way, — be-

pear from the proof in the cause that the debtor, although unable to pay his debts at the time of the conveyance, was at the time of the filing of the bill abundantly able to do so, from property outside the conveyance that could reasonably be subjected to the satisfaction of his debts, the court might in its discretion so frame its decree by limiting a day for the payment of the claim or otherwise as to preserve to the grantee the property conveyed to him while at the same time securing the creditor; but this implies no want of jurisdiction, and is very different from dismissing his bill and remitting the creditor to a suit at law.' This was said of a voluntary conveyance made by an embarrassed debtor, the defendant contending that the bill should allege the debtor's inability to pay his debts at the time of suit. The case of voluntary conveyances stands obviously upon distinctive grounds; the creditor's attack (where the rule in *Reade v. Livingston*, 3 Johns. Ch. 481, does not prevail, and where no fraud was in point of fact intended) is of necessity based upon the ground that the debtor was insolvent, or became so by making the conveyance.

¹ See e. g. *Fox v. Moyer*, 54 N. Y. 125 (voluntary conveyance); *Jaeger v. Kelly*, 52 N. Y. 274 (conveyance for value); *Ruhl v. Phillips*, 48 N. Y. 125; *Hartley v. White*, 94 Penn. St. 31 (value); *Zerbe v. Miller*, 16 Penn. St. 488; *Ashmead v. Hean*, 13 Penn. St. 584; *Dean v. Connelly*, 6 Barr, 239; *David v. Birchard*, 53 Wis. 492;

Graham v. La Crosse Ry. Co. 102 U. S. 148 (subsequent creditors); *City National Bank v. Hamilton*, 34 N. J. Eq. 158 (same); *Allaire v. Day*, 30 N. J. Eq. 231 (same); *Carpenter v. Carpenter*, 27 N. J. Eq. 502; *Hurley v. Taylor*, 78 Mo. 238; *Pelham v. Aldrich*, 8 Gray, 515; *Winchester v. Charter*, 12 Allen, 606; s. c. 102 Mass. 272; *Matthai v. Heather*, 57 Md. 483. A mortgage with intent to cover up part of the mortgagor's property may be wholly void as to creditors though intended as an actual security in regard to the rest of the property. *Holt v. Cramer*, 34 N. J. Eq. 181. See *Hentze v. Bentley*, ib. 562. But see *Feldman v. Gamble*, 26 N. J. Eq. 494, as to separating illegal from legal parts of a mortgage; also *Thomson v. Hester*, 55 Miss. 656. Proof of inadequacy is not enough to affect a purchaser. *Jaeger v. Kelly*, supra.

² See such cases as *Bouslough v. Bouslough*, 68 Penn. St. 495; *Livermore v. Boutelle*, 11 Gray 217 (affirmed in *Chase v. Chase*, 105 Mass. 385, 387, present creditor); *Dugan v. Trisler*, 69 Ind. 553; *Blenkinsopp v. Blenkinsopp*, 1 De G. M. & G. 495; these being cases of conveyances made to avoid executions for alimony *thereafter* decreed. It is nothing that a husband says, in regard to a voluntary conveyance to his wife, that the gift was to save the property to her in case of future debts, if he did not make it in contemplation of contracting debts. *Burgess v. McLean*, 85 Mo. 678.

tween the alienee of the debtor, or of some one conveying on his behalf, and the debtor's general existing creditors; secondly, between the alienee and some class of existing creditors; or thirdly, between the alienee and creditors who became such after the conveyance. And any of these forms of the question may arise in regard to either voluntary conveyances or conveyances for valuable consideration.¹

The question in the first and second aspects, so far as it touches voluntary conveyances, may be shortly disposed of, for the authorities are agreed substantially in the answers to be given. 'A man should be just before he is generous.' The courts have proceeded upon this precept more than upon the strict words of the statute; or rather the 'intent to hinder, delay, or defraud' of the statute has been construed in the light of the precept. Accordingly the question whether a gift of property by a debtor is to be regarded as made with intent to defraud his creditors, within the meaning of the statute, is now generally considered to turn upon the consideration whether the debtor was at the time in a situation to make the gift, in justice to his creditors, i. e. without delaying them in the enforcement of their rights.²

There is no place for question, in such cases clearly, of any intention to delay or defraud in the sense of any actual purpose in the mind;³ nor indeed has there been for two centuries or more, with regard to the claims of those who were creditors at the time of the gift. There was indeed some question formerly whether the statute did not go further than is indicated by the test of recent times; there were not a

¹ As to conveyances for valuable consideration see *infra*, pp. 441 et seq., after the consideration of cases of voluntary conveyances.

² Among the many cases see *Cole v. Tyler*, 65 N. Y. 73; *Carr v. Breese*, 81 N. Y. 584; *Draper v. Buggee*, 133

Mass. 258; *Thacher v. Phinney*, 7 Allen, 146; *Hinde v. Longworth*, 11 Wheat. 199; *Barrack v. McCulloch*, 3 Kay & J. 110; post, chapter on Voluntary Conveyances: Condition of the Debtor.

³ See post, p. 116.

few dicta of the judges, and there was at least one famous decision by an eminent chancellor, to the effect that the test whether the conveyance was fraudulent or not was simply whether the grantor was indebted at the time. The amount of the debt or debts was immaterial; it was supposed to be dangerous to permit any inquiry into such a matter to defeat an *existing* creditor in attempting to reach the alienated property.¹

But this view never found very general favor; on the contrary it came by degrees to be repudiated by most of our courts.² The test now more widely accepted makes this the inquiry, to wit, whether the debts are such that to withdraw the property in question from the claims of creditors would defeat or delay them. Whether the gift in such a case was made in good faith or not, whether the debtor intended to pay his creditors in full or not, whether he expected that his other property or the profits of a prosperous business³ would enable him to do so or not; in a word, however honest his intentions, the case is within the 'intent to hinder, delay, or defraud' expressed in the statute of Elizabeth.⁴ It is only another way of stating the rule to say that if the necessary effect of the gift is to delay creditors, the intent is sufficiently made out.⁵

¹ *Reade v. Livingston*, 3 Johns. Ch. 481 (1818), Chancellor Kent reviewing all the cases. The case of subsequent creditors was distinguished on that point. See post, p. 99. Contra in some states. *Johnston v. Gill*, 27 Gratt. 587; *Hatcher v. Crews*, 78 Va. 460; *Early v. Owens*, 68 Ala. 171; *Claffin v. Mess*, 30 N. J. Eq. 211; *Hurley v. Taylor*, 78 Mo. 238.

² Post, chapter on Voluntary Conveyances: Condition of the debtor.

³ *Cole v. Tyler*, 65 N. Y. 73. 'It will be said that' the debtor 'was in prosperous business, and might soon have acquired the necessary means.

This suggestion is not to the purpose. The true inquiry is, Had he at the time the alleged fraudulent conveyance was made sufficient means to pay his debts?' Dwight, C.

⁴ *Ex parte Chapin*, 26 Ch. D. 319, 331, C. A.; *Cole v. Tyler*, supra; *Kimball v. Thompson*, 4 Cush. 441.

⁵ *Freeman v. Pope*, L. R. 5 Ch. 538; *Thompson v. Webster*, 7 Jur. N. s. 531, H. L.; *Babcock v. Eckler*, 24 N. Y. 623; *Rencher v. Wynne*, 86 N. Car. 268; *Cheatham v. Hawkins*, 80 N. Car. 161; *Farrow v. Hayes*, 51 Md. 498; *Sims v. Gaines*, 64 Ala. 392. Whether it is

It should be observed further that if the 'intent' of the statute is satisfied in regard to the debtor, in the case of a *voluntary* conveyance, it is immaterial whether the grantee participated in the wrong or not, or whether he had any knowledge of it or not; nor does it matter that the grantee is wife or child of the debtor.¹ Being a volunteer, the party can stand in no better situation than the debtor; the point, if authority is needed, has been specifically decided upon ample consideration.² The grantee will not indeed be guilty of (actual) fraud if he did not participate in fraud; but it is not necessary that he should be. He will be a trustee in law for the creditor, and must perform the trust; if he refuse, he may be treated, if that be at all important, as guilty of constructive fraud by conduct subsequent.³ And the rule applies to the rights of subsequent as well as to those of existing creditors.⁴

On the other hand where the grantee is aware of the grantor's situation, and knows that the effect of the gift will be to delay creditors,⁵ and especially where the grantee pre-

necessary to show an actual intent in the debtor's mind where the necessary effect of the gift is not to delay creditors, *quære*? See *Ex parte Mercer*, 17 Q. B. D. 290, C. A., Lord Esher; *infra*, p. 110.

¹ *Townshend v. Windham*, 2 Ves. 1; *Lush v. Wilkinson*, 5 Ves. 384; *Holloway v. Millard*, 1 Madd. 414; *Richardson v. Smallwood*, Jacob, 552; *Jenkyn v. Vaughan*, 8 Drew. 419; *French v. French*, 6 De G. M. & G. 95; *Freeman v. Pope*, L. R. 5 Ch. 538; *Barrack v. McCulloch*, 3 Kay & J. 110; *Ex parte Russell*, 19 Ch. D. 588, C. A.; *Sexton v. Wheaton*, 8 Wheat. 229; *Robinson v. Clark*, 76 Maine, 493; *Laughton v. Harden*, 68 Maine, 208; *Clark v. Chamberlain*, 13 Allen, 257; *Lynde v. McGregor*, 13 Allen, 182; *Shand v. Hanley*, 71 N. Y. 319; *Hunters v. White*, 3 Gratt. 26; *McCole v. Loehr*, 79 Ind.

430; *Spinner v. Weick*, 50 Ind. 213; *Matson v. Melchor*, 47 Mich. 477.

² *Laughton v. Harden*, 68 Maine, 208 (the grantee was son of the debtor); *Robinson v. Clark*, 76 Maine, 493 (debtor's wife); *Clark v. Chamberlain*, 13 Allen, 257 (debtor's wife); *Lynde v. McGregor*, 13 Allen, 182 (wife); *McCole v. Loehr*, 79 Ind. 430 (wife); *Spaulding v. Blythe*, 73 Ind. 93; *Sherman v. Hogland*, *ib.* 472; *Lee v. Figg*, 37 Cal. 328; *Tunison v. Chamblin*, 88 Ill. 378.

³ *Ib.*; vol. 1, p. 384. Secus of course if the conveyance is for valuable consideration. *Golden v. Gillam*, 51 L. J. Ch. 503, C. A., affirming 20 Ch. D. 389; *Gale v. Williamson*, 8 Mees. & W. 405.

⁴ *Laughton v. Harden*, *supra*; *Shand v. Hanley*, *supra*.

⁵ See *Rencher v. Wynne*, 86 N. Car.

vails upon a debtor weak in body or mind to make the gift, the gift will be void towards creditors who are delayed thereby, though for some part of it there is an adequate consideration.¹ What the grantor's intention in the matter was is irrelevant.²

Indeed if the voluntary grantee has notice, after the conveyance, that the gift is in fraud of the rights of creditors, it will not be safe for him to improve the estate; he not only cannot improve the creditors out of their rights, he cannot claim the benefits, it seems, of the improvements, assuming that the estate with them is not more than sufficient to pay the debts in question.³ But there may be some doubt in regard to this rule.⁴

Thus far of cases of gifts and voluntary conveyances. When we come to conveyances made for valuable consideration, a different question, applicable alike to existing and to future creditors, arises. Such conveyances, if made in good faith, are expressly excepted from the operation of the statute. When is a conveyance not made in good faith? Is it necessary that it should be made with actual intent to defraud, to take it out of the exception? So it appears to have been laid down. 'There is one class of cases, no doubt,' it has been said by way of concession, 'in which an actual and express intent is necessary to be proved, that is . . . where

268; *Cheatham v. Hawkins*, 80 N. Car. 161; s. c. 76 N. Car. 335.

¹ *Cornish v. Clark*, L. R. 14 Eq. 184.

² *Ib.* ('I am of opinion that the acts of the settlor or donor are equally obnoxious to the provisions of the statute whether they proceed from himself alone or whether they are instigated by others.' *Romilly, M. R.*); *Norton v. Norton*, 5 Cush. 524, 528 (consideration in part).

³ *Shand v. Hanley*, 71 N. Y. 319. *Folger, J.*: 'She [the grantee, wife of the grantor] took her deed, and if she made

the improvements made them after the filing of the *lis pendens* in the action upon the debt of the plaintiff against W H and his partner, wherein an attachment was issued on the ground that this real estate had been assigned with fraudulent intent. This was constructive notice to her of the insecurity of her title and of the equitable lien of the plaintiff, and apprised her of the imprudence of making any outlay upon the premises.'

⁴ See *Lockhard v. Beckley*, 10 W. Va. 87.

the instruments sought to be set aside were founded on valuable consideration.¹

Whether language so strong as this is borne out by the authorities upon which it professes to rest may be the subject of a doubt.² Might there not be facts and circumstances such as to make a case of fraud as matter of law in respect of a purchase for valuable consideration, though such facts might be consistent with want of any actual intent to delay or defraud in the mind of the parties? It would be unsafe, it is apprehended, to answer this in the negative, upon the footing of any established authority at the present time. Suppose a grantor of property, under an absolute sale for value, were to retain possession thereafter for fear that it might be taken by the creditors of the grantee; if the conveyance should be attacked by the *grantor's* creditors, would it be any defence that in point of fact there was no intent in the mind of either grantor or grantee to delay the grantor's creditors? Would the mere state of mind of the parties be relevant?³ It is certainly a difficult matter to make a case against a purchaser for value,⁴ especially for full value; and

¹ Giffard, L. J. in a dictum in *Freeman v. Pope*, L. R. 5 Ch. 538, quoted by Fry, J. in *In re Johnson*, 20 Ch. D. 389. The language is based upon *Holmes v. Penney*, 3 Kay & J. 90, and *Lloyd v. Attwood*, 3 De G. & J. 614.

² In point of fact no such language is used in the cases referred to; the only thing was that in *Holmes v. Penney* the court considered that fraud was not proved, and that in *Lloyd v. Attwood*, a case of a subsequent *purchaser*, the court found the contrary. Whether fraud was to be shown by 'an actual and express intent,' or how it was to be shown, was not stated.

³ 'If the motive to be ascertained, not from the act itself and its results, but from the subsequent declarations of the parties to the transaction, is to

be the test of the validity of conveyances, they would depend, not upon the clear and well-settled principles of law, but upon the capricious and uncertain temper of individual persons.' *Rencher v. Wynne*, 86 N. Car. 268, Smith, C. J. quoting *Cheatham v. Hawkins*, 80 N. Car. 161.

⁴ 'Those who undertake to impeach for mala fides a deed which has been executed for valuable consideration have, I think, a task of great difficulty to discharge.' Turner, L. J. in *Harman v. Richards*, 10 Hare, 81, 89, quoted by Fry, J. in *In re Johnson*, 20 Ch. D. 389, 394. See also *Nugent v. Jacobs*, 103 N. Y. 125; *Billings v. Russell*, 101 N. Y. 226; *Holmes v. Penney*, 3 Kay & J. 90, 99. That the purchase is not for full value is

it well should be, for the debtor has still the right to sell his property, and the creditor has still his resort to the substituted property. It is no delay in law that he cannot reach the property sold.¹

However, the statement under consideration comes only to this, that where the plaintiff is cut off from all other means of proving the 'intent' of the statute, from sheer want of evidence, such as that the conveyance was voluntary, he may still show, if he can, as in any other case, that the purchaser took with 'actual and express intent' to delay the seller's creditors. This is far from saying that to constitute the intent of the statute there must be an intent in point of fact in the mind; it implies the contrary. To give it such an effect, it should be necessary in all cases to show a real purpose to delay creditors; a voluntary conveyance by an insolvent debtor should be only *evidence* of an intent, capable of being met by counter evidence of honest motives.²

not necessarily fatal. See *In re Johnson*, supra, a case of family arrangement; *Copis v. Middleton*, 2 Madd. 410, 426.

¹ 'The statute does not deprive a man of the power of selling his estate, or doing what he pleases with the purchase money.' Sir Thomas Plumer, V. C. in *Copis v. Middleton*, 2 Madd. 410, 430. See also *Freeman v. Pope*, L. R. 5 Ch. 538, that it seems to be not enough for the creditor to show that a voluntary settlement has in the event prevented him from obtaining payment of his debt.

² See *Fellows v. Smith*, 40 Mich. 689; *Hunters v. White*, 3 Gratt. 26; *Norton v. Norton*, 5 Cush. 524, 528. Some courts appear indeed to treat the case of a voluntary conveyance by an insolvent debtor as only *prima facie* evidence of fraud. *French v. Holmes*, 67 Maine, 189, 193; *Stevens v. Robinson*, 72 Maine, 381; *Booher v. Worrill*, 57

Ga. 235. That is certainly wrong, unless statute so requires. But even in that case evidence that the grantor did not, in his mind, intend to delay or defraud his creditors would not be allowed, it is conceived, to overturn the presumption of fraud. To overturn the presumption, which will be a very strong one, the facts would require satisfactory explanation; and the mere existence of good motives would be no explanation. See the later case of *Robinson v. Clark*, 76 Maine, 493, where the court, speaking of a voluntary conveyance of the last of the property of an insolvent debtor to his wife, says: 'The next point in defence is that there was no intention to conceal or defraud. That is not a material fact if it be so. . . . She . . . cannot withhold it from his creditors whether fraud were intended or not.' See also *Cole v. Tyler*, 65 N. Y. 73, in which the court says: 'This presumption is not to be over-

The next question is this: Assuming the existence of an 'intent,' within the meaning of the statute, to defraud one class of existing creditors, may the case be treated as one of 'intent' to defraud other classes of such creditors? This is a broad question, one indeed that in that form does not often come before the courts; but it sometimes arises and is important in its bearing upon the meaning of the word 'fraud.' The answer to be given to the question is in the affirmative. In principle if A makes a conveyance to B, with intent to defraud his foreign creditors, or his partnership creditors, or his bond creditors, or any special set of creditors, that conveyance is fraudulent under the statute, plainly towards them; but when it is once impeached successfully by them, or by any of them, all creditors will *prima facie* be let in to share the benefits.¹ But this shows that all creditors have *prima facie* an equity; and hence it should make no difference what creditors should proceed against the conveyance.² The statute is to be liberally construed; and A having made a conveyance to B in fraud of C, the case is within the statute, and D as well as C may avail himself of the fact.³ Nor is it material whether the conveyance was voluntary or for valuable consideration; once let it appear that there was an 'intent to hinder, delay, or defraud,' and the payment of full

thrown by mere evidence of good intent or generous impulse.' That was said of a presumption of fraud arising from the fact of a voluntary conveyance by a debtor; the New York courts do not support the view that there is only a *prima facie* presumption of fraud where a gift is made by an insolvent debtor or by a debtor who is made insolvent by it. See *Cole v. Tyler*, *supra*.

It may well be that, in a case in which fraud as a fact is to be found or not, where the evidence is contradictory, the grantor may testify what his actual intention was. *Sedgwick v. Tucker*, 90 Ind. 291; *Ex parte Mercer*, 17 Q. B. D.

290, C. A., post, pp. 109, 110. See also *Jarvis v. Banta*, 83 Ind. 528. But that is the extent to which evidence of the kind should be allowed to go.

¹ *Paston v. Lea*, Palmer, 414, 415, Sir Wm. Jones referring to a case of *Tubervill v. Tipper*; *Taylor v. Jones*, 8 Atk. 600; *Richardson v. Smallwood*, Jacob, 552; *Jenkyn v. Vaughan*, 3 Drew. 419; *Strong v. Strong*, 18 Beav. 408; *Thomson v. Dougherty*, 12 Serg. & R. 448; *Gebhardt v. Merfeld*, 51 Md. 322.

² See *Jenkyn v. Vaughan*, *supra*, a case of subsequent creditors.

³ *Allen v. Kenyon*, 41 Mich. 281.

value will not help the case, for the exception in the statute requires the conveyance to be in good faith.

Coming now to the third question, we have to consider whether what has been stated, especially what was last stated, is applicable to subsequent creditors, that is, to creditors who became such after the fraudulent conveyance, when there was in point of fact no intent to defraud them. This has been, and still is in this country, a question about which the authorities give discordant answers; though there has never been any doubt that if the debtor intended to defraud future creditors, or any one future creditor, all such creditors may treat the conveyance as invalid.¹ But suppose there was in point of fact no such intent; that has been thought to raise a different question. The importance of the matter will justify a particular examination of the authorities, historically, upon the point.²

So long ago as the year 1625 it was stated by Sir Wm. Jones in argument, and the statement was assented to on the other side, that if a debtor makes a fraudulent gift to defraud one creditor only, the gift is void as to all creditors and all forfeitures.³ At the end of the same century however the

¹ Among the American authorities see *Reade v. Livingston*, 3 Johns. Ch. 481, 500; *Savage v. Murphy*, 8 Bos. 75; s. c. 34 N. Y. 508; *Belford v. Crane*, 16 N. J. Eq. 265; *Harlan v. Maglaughlin*, 90 Penn. St. 298 (a case to be criticised later); *Laughton v. Harden*, 68 Maine, 208; *Sexton v. Wheaton*, 8 Wheat. 229; *Carter v. Grimshaw*, 49 N. H. 100. But in Pennsylvania it is considered not enough that a voluntary conveyance is made in expectation of future indebtedness. *Harlan v. Maglaughlin*, *supra*.

² It must be understood that we are speaking of the statute of 18th Elizabeth throughout this inquiry. The New York statute of Uses and Trusts, 1 R. S. 728, § 52, which has been much

copied, makes a distinction between present and future creditors. By that statute a trust is created in favor of *existing* creditors of one who advances the purchase money of land conveyed to another. Subsequent creditors are postponed. *Wood v. Robinson*, 22 N. Y. 564. The statutory trust will prevail over the equal equity and the superior diligence of the future creditor. *Ib*.

³ *Paston v. Lea*, Palmer, 414, 415, referring to *Tubervill v. Tipper*. See *Savage v. Knight*, 92 N. C. 493; *McLane v. Johnson*, 43 Vt. 48; *Lehman v. Kelley*, 68 Ala. 192; *Allen v. Kenyon*, 41 Mich. 281; *Allen v. Rundle*, 50 Conn. 9; *Kehr v. Smith*, 20 Wall. 86; *Barrett v. Nealon*, 119 Penn. St. 171

Court of Chancery appears to have been of another mind. The plaintiff had previously sued M for criminal conversation, whereupon M made a conveyance of his land to trustees to pay debts mentioned in a schedule annexed, and such other debts as he should appoint within a certain short time. The plaintiff recovered £5000 damages in his suit at law, and now sought to have the trust deed set aside as having been made to defeat him of his (then future) judgment debt. But the court dismissed the bill; declaring that the deed was not fraudulent either at law or in equity, because the plaintiff was not a creditor at the time of the execution of the deed.¹ The case would not, it seems, be law at the present time.²

The next case³ to be noticed was decided in the year 1705. Upwards of thirty years before that time Wm. Marbury had made a conveyance of his estate to Brooks and others, to the use of himself for life, with power to mortgage such part of it as he should think fit, remainder to the trustees and their heirs in trust to sell, and then pay all his debts. Afterwards he became indebted by several judgments and statutes, and also on bond and on simple contract. The estate was all covered with mortgages, when the judgments were obtained and the statutes acknowledged, so that the creditors by judgment and by statute could not recover their debts at law. It was held that these creditors were to be preferred to the creditors by bond and simple contract, and that the deed of trust was fraudulent towards them. The reasons given were, first, that Marbury continued in possession and kept the deed in

¹ *Lewkner v. Freeman*, Prec. Ch. 105; 2 Freem. 236; 1 Eq. Cas. Abr. 196, pl. 5. A. D. 1699. Another it.' and therefore it was conscientious in him to prefer the other debts before

rather remarkable reason was given:

'And though it were made with intent to prefer his real [i. e. actual] creditors before this debt, when it came afterwards to be a debt, yet it was a debt founded only in *maleficio*,

² *Blenkinsopp v. Blenkinsopp*, 1 De G. M. & G. 495; *Livermore v. Boutelle*, 11 Gray, 217. It could hardly be law on the footing of preference.

³ *Tarback v. Marbury*, 2 Vern. 510.

his custody, and secondly, that the reservation of a power to mortgage to any extent had the effect of a power of revocation. No point was made that the plaintiffs were subsequent creditors.

Somewhat later a case¹ already referred to in another connection² came before Sir Wm. Fortescue at the Rolls, in which the question was first directly made and considered whether subsequent creditors were within the contemplation of the first of the statutes of Elizabeth. The question was answered in the affirmative; the Master of the Rolls saying that the word 'others,' in the phrase with 'intent to hinder, delay, or defraud creditors and others,' seemed to be inserted to take in all manner of persons, as well creditors after as before the conveyance, who should be defrauded.³

A series of cases now came before Lord Hardwicke, the first one⁴ being of the year 1745. This was a bill to set aside a voluntary settlement by way of sale, as in fraud of creditors, the case turning partly, as Lord Hardwicke put it, upon the construction of the statute of 13th Elizabeth. His lordship declared that it was not sufficient that the settlement was voluntary. It had been said that all voluntary settlements were void against creditors, just as they were against subsequent purchasers under the statute of 27th Elizabeth. But that was not true; there was this distinction between the two statutes: On the 13th of Elizabeth it was necessary to prove that the settlor was indebted at the time of making the settlement, or immediately after executing it; on the 27th of Elizabeth a settlement was indeed clearly void, if voluntary, against subsequent purchasers, but that statute applied only to subsequent purchasers.⁵

¹ *Taylor v. Jones*, 2 Atk. 600 (1743).

² *Ante*, p. 70.

³ See *Holmes v. Penney*, 3 Kay & J. 90, 100; *Livermore v. Boutelle*, 11 Gray, 217.

⁴ *Walker v. Burroughs*, 1 Atk. 93.

⁵ The conveyance was held void however under the bankruptcy, as having been made by a trader. See *Glaister v. Hewer*, 8 Ves. 195, distinction shown by Sir Wm. Grant.

A few years later, after another case¹ in which the subject is again referred to by his lordship, and left in doubt, a more famous case² came before him; in which the distinction above mentioned is taken again. Creditors filed a bill for an account and satisfaction out of the assets of their debtor, impeaching to that end a voluntary execution, by will, of a general power of appointment by him, in respect of a chattel interest in land, in favor of his daughter. Lord Hardwicke, in a considered judgment, held that where the donee of a power, which he might execute for any purpose whatever, executed it voluntarily, for the benefit of a third person, the property appointed should be considered as part of his assets, and his creditors should have the benefit of it;³ that is, all his creditors at the time of his death in the case of a will (or at the time of the execution of the power in the case of a deed), and that would embrace creditors who became such after the power of appointment — which was equivalent to a gift to him of the property at his pleasure — was given to him. Speaking of the claims of subsequent creditors, his lordship said that he knew of no case on the 13th of Elizabeth where a man, indebted at the time, made a mere voluntary

¹ *White v. Sansom*, 3 Atk. 410 (1746). Lord Hardwicke: 'I hardly know an instance where a voluntary conveyance has not been held fraudulent against a subsequent purchaser. . . . But here is another circumstance, for the plaintiff's debt does not appear to have accrued by breach of covenant till *after* the conveyance in execution of the power. I have heard it said in this court that there are reasonable voluntary settlements which they [*sic*] will not interpose to disturb, upon the construction of these statutes. There are words in the proviso of the statute which seem to admit such construction. 13 Eliz. c. 5, § 4. . . . As it is a doubtful case whether the plaintiff's debt accrued till after the convey-

ance in execution of the power, I must dismiss the bill.' See also the earlier case of *Russel v. Hammond*, 1 Atk. 13 (1738), in which Lord Hardwicke said: 'There are, to be sure, cases of voluntary settlements that are not fraudulent, and those are where the person making is not indebted at the time; in which case subsequent debts will not shake such settlement.' See *Stephen v. Olive*, 2 Bro. C. C. 90.

² *Townshend v. Windham*, 2 Ves. 1 (1750).

³ See *Johnson v. Cushing*, 15 N. H. 298, 310 et seq., Parker, C. J. explaining the words 'general power,' and following in an opinion of great learning the rule in *Townshend v. Windham*.

conveyance (to a child¹) and died indebted, but that the property should be considered as part of his estate, for the benefit of his creditors.²

Next in point of time comes a case,³ in which Lord Kenyon at the Rolls appears to have been of opinion — the case is very shortly reported — that unless an antecedent debt was shown, a subsequent creditor could have no standing against the conveyance. And this is followed by a well-known case⁴ before Lord Alvanley, also at the Rolls; in which a subse-

¹ These words were immaterial. See *infra*, p. 95.

² The whole passage should be quoted. 'There is no case,' said his lordship, 'where a person indebted makes a conveyance of a real or chattel interest for the benefit of a child, without the consideration of marriage or other valuable consideration, and dying afterwards that that shall take place [i. e. the conveyance stand]. There is certainly a difference between the statutes of fraud of the 13th Elizabeth, which is in favor of creditors, and the 27th Elizabeth, which is in favor of purchasers. But that difference was never suffered, by way of general rule, to go further than this: On the 27th Elizabeth every voluntary conveyance made, where afterwards there is a subsequent [*sic*] conveyance for a valuable consideration, though no fraud in that voluntary conveyance, nor the person making it at all indebted, yet the determinations are that such mere voluntary conveyance is void at law by the subsequent for valuable consideration. But the difference between that and the 13th Elizabeth is this: If there is voluntary conveyance of real estate or chattel interest by one not indebted at the time, though he afterwards become indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of

fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appears, that will make it void; otherwise not, but it will stand, though afterwards he becomes indebted. But I know no case on the 13th Elizabeth where a man indebted at the time makes a mere voluntary conveyance to a child, without consideration, and dies indebted, but that it shall be considered as part of his estate for benefit of his creditors; and on that foundation, I take it, this court has grounded their opinion in the execution of powers, when they stop in transitu (as it is called), and say it shall not be given away from creditors.' See *Stephen v. Olive*, 2 Bro. C. C. 90, where Lord Kenyon, following this case, held that, though a settlor of a voluntary settlement was indebted, yet if the debt was secured by a mortgage, the settlement was good.

³ *Stephens v. Olive*, 2 Bro. C. C. 90 (1785).

⁴ *Lush v. Wilkinson*, 5 Ves. 384 (1800). See also *Glaister v. Hewer*, 8 Ves. 195 (1802), where Sir Wm. Grant says that a settlement by one not a trader cannot be set aside because it is voluntary, though the settlor afterwards becomes bankrupt. *Lilly v. Osborn*, 3 P. Wms. 298; *Crisp v. Pratt*, Cro. Ch. 548.

quent creditor sought through an account to invalidate a post-nuptial voluntary settlement, there being no evidence that the husband was indebted when he executed the deed. Lord Alvanley declared not only that the bill could not be maintained, but that it would not be enough to allege a single debt; debts to the extent of insolvency should be shown.¹

Shortly afterwards a case² went from Sir Wm. Grant on appeal to Lord Eldon, which finally turned upon the application of the old Bankruptcy Act of James the First.³ That raised a different sort of question; a voluntary settlement by a *trader* under the old bankruptcy laws could be avoided upon the subsequent bankruptcy of the settlor, though he was not indebted at the time of making it.⁴ There had been a settlement of land for the benefit of a trader and his wife, whether voluntary towards the wife was not clear; and the husband and wife having afterwards mortgaged the property, and the husband having become and having died bankrupt, the question, on a bill by the widow to redeem, was whether the settlement was void. Sir Wm. Grant considered the case as not within the bankruptcy laws, and that, the husband not being indebted when the deed was made, the settlement was good; but Lord Eldon held the case to be within the statutes of bankruptcy.⁵

Four years later a case⁶ often cited was tried before the

¹ 'Every man,' said his lordship, 'must be indebted for the common bills for his house, though he pays them every week. It must depend upon this, whether he was in insolvent circumstances at the time. . . . It is very extraordinary for a subsequent creditor to come with a fishing bill, in order to prove antecedent debts.'

² *Glaister v. Hewer*, 8 Ves. 195 (1802).

³ 19 Jac. 1, c. 15.

⁴ *Walker v. Burroughs and Glaister v. Hewer*, *supra*.

⁵ The Master of the Rolls had held that the bankruptcy statutes did not comprise cases of settlements upon a wife; this view Lord Eldon decided to be wrong. As to the moral duty of the husband to make provision for his wife his lordship said: 'I do not know that the court has ever under these Acts of Parliament supported a provision upon that principle of moral duty.'

⁶ *Kidney v. Coussmaker*, 12 Ves. 136 (1806).

same learned Master of the Rolls. A creditor had filed a bill to affect all the devisees under the will of his debtor; and the answer disclosed, what the creditor was not aware of, a voluntary settlement, which had been made before the creditor's claim arose. There was no evidence that the deceased was indebted when he made the settlement; and it was accordingly held that the deed must stand.

The next case¹ brings us to the time of Sir Thomas Plumer, Vice Chancellor, by whom several cases of the kind were considered. The first of these was a creditor's bill against the executors of S H and also against the trustees and cestui que trust under a voluntary settlement by her, praying an account, and that any deficiency in assets should be supplied out of the settled property. The bill did not state that S H was indebted when she made the settlement, but charged that it was made in favor of an illegitimate child; the plaintiffs relying upon a passage in one of Lord Hardwicke's judgments already quoted,² and contending that, though a voluntary settlement by one not indebted was good against future creditors if made in favor of a wife or child, yet that if it was made in favor of a stranger, such as an illegitimate child, it could not prevail against such creditors.

The learned Vice Chancellor however decided that Lord Hardwicke was not to be understood as limiting the rule to the case before him, of a child; it was not to be inferred that every voluntary conveyance not in favor of a child was subject to the claims of creditors. If in the passage referred to the words 'for a child' had been left out, the proposition would still have been correct; and he had Lord Hardwicke's own authority, he stated, for saying so.³

¹ *Holloway v. Millard*, 1 Madd. 414 (1816).

² *Townshend v. Windham*, 2 Ves. 1, 11; ante, p. 93, note.

³ Referring to *Walker v. Burroughs*, 1 Atk. 93, ante, p. 91, where the propo-

sition was laid down generally, without the words 'for a child,' to wit, that a voluntary settlement by one not indebted is good against subsequent creditors. So also in *Russel v. Hammond*, 1 Atk. 13.

The next case¹ before this able judge was one touching a voluntary settlement by a husband not indebted, in favor of his wife and children, which the wife by bill sought to establish; and no creditor attempting to impeach it, the bill was sustained. No doubt could be entertained that a deed made in such a case was good against subsequent creditors. A little later a bill before the same judge to set aside a voluntary settlement as in fraud of the plaintiff was sustained; the plaintiff having become a creditor by breach of a covenant entered into with him by the settlor before the execution of the settlement.² In the course of the argument the judge said that he did not recollect a case in which a voluntary settlement had been sustained against subsequent creditors, where the settlor was largely indebted at the time; and this principle applied to the case of money obtained by subsequent credits to pay off creditors anterior to the conveyance.³

Two English cases remain to be noticed; the first of which⁴ only need be stated, the second⁵ shortly treating the first as a final declaration of the law. The first case was a bill by a subsequent creditor to set aside certain voluntary deeds of

¹ *Battersbee v. Farrington*, 1 Swanst. 106 (1818).

² *Richardson v. Smallwood*, Jacob, 552 (1822).

³ 'All the cases,' said the court, 'say that the deed will stand if the party be not indebted and if it be not fraudulent. [See *Sexton v. Wheaton*, 8 Wheat. 229; *Jackson v. Miner*, 101 Ill. 550; *Belford v. Crane*, 16 N. J. Eq. 265; *Benton v. Jones*, 8 Conn. 186; *Salmon v. Bennett*, 1 Conn. 525; *Howe v. Ward*, 4 Greenl. 195; *French v. Holmes*, 67 Maine, 186.] Being indebted is only one circumstance from which evidence of the intention may be drawn. But suppose a person indebted to execute a conveyance such that if those who were creditors at the time complained, it would be void as to

them; then if they are paid off, and a new set of creditors stand in their places, does that make any difference? Does it not hinder and delay these creditors, and is it not void as to them? If it be not so, it would be easy to evade the statute; the party may pay off those to whom he is then indebted by borrowing of others, and he may then say to them, "I did not make the settlement to defraud you, but to defraud the other persons who were my creditors." To the same effect, *Savage v. Murphy*, 8 Bosw. 75, *Hoffman, J.*; affirmed, 34 N. Y. 508.

⁴ *Jenkyn v. Vaughan*, 3 Drew. 419 (1856).

⁵ *Freeman v. Pope*, L. R. 5 Ch. 538.

settlement as in fraud of the settlor's creditors. The debtor died some years after making the settlement, largely indebted; and he was in debt in considerable amounts at the time of executing the deeds of settlement. But it was not clear, on the evidence, whether all these prior debts had been paid, or whether some of them did not still subsist when the plaintiff's debt accrued. Vice Chancellor Kindersley, a very able judge, said in the first place that there was no question that subsequent creditors were entitled to participate if a conveyance was set aside by any creditor; there was no distinction between the two classes in such a case; all participated pro rata.

This showed, as the Vice Chancellor stated, that a subsequent creditor had an equity; and, *prima facie*, having an equity, he was himself entitled to file a bill to enforce the same. Now existing creditors could under the statute of Elizabeth annul a voluntary conveyance if the debtor included in it such an amount that, having regard to the state of his property and the extent of his liabilities, its effect might be to delay his creditors; and, assuming that any of those debts remained unpaid at the time of filing a bill by a subsequent creditor, then, inasmuch as the prior creditor could have the conveyance set aside, a subsequent creditor also, having thus an equity, could have it set aside. But he was inclined to think, though that was not necessary to the case, that if no debt of the time of the execution of the deed remained unpaid when the subsequent creditor filed his bill, the bill could not be maintained; unless indeed there was some other ground for inferring the intention to defraud.¹

¹ 'If a subsequent creditor,' said the Vice Chancellor, 'files a bill, and you can show that the person who executed the deed, though indebted at the time he made it, has paid every debt, it is very difficult to say that he executed the settlement with an intention to de-

feat or delay creditors, since his subsequent payment shows that he had not such an intention. [But that *reason* has been set aside; the real intention would be immaterial in the face of the necessary effect of the deed. *Freeman v. Pope*, L. R. 5 Ch. 538. See however

Such in substance was the reasoning of the court; and in a recent case¹ on appeal in chancery, in which subsequent creditors were considered entitled to come in with existing creditors upon the successful impeachment of a voluntary settlement, Lord Justice Giffard said that there could be no reason for doubting the correctness of that decision either in point of principle or of justice. The decision of Vice Chancellor Kindersley accordingly settled the law, so far as there was any room for doubt before; and the result, so far, is (1) that there need be no actual intent on the part of the debtor to delay or defraud future creditors, but that where there is, at the time of filing a bill² by a subsequent creditor, a creditor of the time of the conveyance who could have the conveyance set aside, the bill will be sustained, and (2) that if a prior creditor file the bill and succeed, subsequent creditors are let in on equal terms.³

The American cases, as we have intimated, do not speak with the same certain sound; though most of them, it is believed, are in substantial accord with the doctrine finally

Clafin v. Mess, 30 N. J. Eq. 211, 213, where it is repeated.] But it appears to me, in the absence of authority to the contrary, that a subsequent creditor may file a bill if any debt due at the date of the deed remains due at the time of filing the bill.' See *Clafin v. Mess*, *supra*.

'When we look at the authorities, we find that in two or three cases, where the question has been raised as to the plaintiff's right to file a bill, being a subsequent creditor, and debts antecedent have been shown still to subsist, the court, having its attention drawn to that, has made a decree in favor of the creditor.' See the subsequent case of *Holmes v. Penney*, 3 Kay & J. 90, 99, Wood, V. C.

Existing creditors would of course be let in to participate in the benefits of

voluntary conveyances set aside at the suit of subsequent creditors; and this though the conveyances were intended to defraud the latter only.

¹ *Freeman v. Pope*, L. R. 5 Ch. 538.

² The rule has since been extended. *Infra*, p. 105.

³ To these cases may be added cases in which it is held that where a voluntary conveyance by a debtor is set aside after his death, the property becomes assets as of that time. See *Townshend v. Windham*, 2 Ves. 1, ante, p. 92; *Scarf v. Southy*, 16 Sim. 344, reversed, but not on that point, *ib.* 481; *Shears v. Rogers*, 3 Barn. & Ad. 362. That is, the property is assets in favor of all creditors, after as well as before the conveyance. As to the proposition itself see ante, pp. 88, 89.

established by Vice Chancellor Kindersley. Our authorities begin with a familiar case¹ before Chancellor Kent. That case has in part been repeatedly denied; in so far as it decided that a voluntary conveyance was invalid per se against existing creditors, without regard to the extent of the debts as compared with the amount of property which the debtor still retained, it is not generally accepted law.² But in regard to what Chancellor Kent said of the rights of subsequent creditors, though that was extra-judicial, it is in substantial accord, so far as it goes, with the English doctrine as shown above, and has often been cited as authoritative. The opinion of the learned chancellor, though he declared that his mind was open to further consideration, was that the existence of debts when the voluntary conveyance was made might be such as to raise an inference of fraud in favor of subsequent creditors;³ which would be repelled by evidence that their debts were secured by mortgage or by a provision in the settlement.⁴ If there was nothing of the kind, such creditors would be entitled to impeach the settlement by a bill properly adapted to the purpose, and charging indebtedness at the time of the conveyance; so that their rights should not rest upon the mere pleasure of the prior creditors. And they would need to go so far, and only so far, in showing debts as would be sufficient to create reasonable evidence of a fraudulent intention.⁵ Thus far the case is in substantial accord with

¹ *Reade v. Livingston*, 3 Johns. Ch. 481, 500.

² See the next chapter.

³ See *Thacher v. Phinney*, 7 Allen, 146, 150; *Beal v. Warren*, 2 Gray, 447, 454; *Shears v. Rogers*, 3 Barn. & Ad. 362; *Gale v. Williamson*, 8 Mees. & W. 405. Further see next chapter.

⁴ *Thomson v. Dougherty*, 12 Serg. & R. 448. 'Mortgage' and 'provision' are only examples. There may be some pertinency in the inquiry how the debtor could provide for future debts the na-

ture and extent of which might be entirely past prognostication. *Harlan v. Maglaughlin*, 90 Penn. St. 293. The provision however might be that the settlement should yield, as far as might become necessary, to the claims of creditors; then indeed it would not be fraudulent.

⁵ The learned chancellor denied the dictum of Lord Alvanley in *Lush v. Wilkinson*, 5 Ves. 384, ante, p. 94, n., that debts to the extent of insolvency should be shown; but debts sufficient to

the English rule ; indeed the whole case, with its distinction between the two classes of creditors (that a voluntary conveyance is *per se* fraudulent towards existing creditors, but that future creditors must show fraud in fact), has become the law of some of the states.¹

The Supreme Court of New York afterwards entertained the same general view in regard to subsequent creditors, referring with approval to the opinion of Chancellor Kent as authority.² The plaintiff in this case however was a subsequent purchaser as well as subsequent creditor. Later the rights of subsequent creditors, in a case of fraud upon *them*, underwent searching consideration both by the Superior Court of New York city and by the Court of Appeals ; and the doctrine maintained in one of the cases³ before Sir Thomas Plumer was laid down. The case⁴ referred to was this : A judgment debtor, engaged in a large business on credit and considerably in debt, made a voluntary conveyance of all his property to his wife and children, without visible change of possession, and with intent to continue the business and to contract future debts in carrying it on, upon his apparent ownership of the property. The debtor continued his business accordingly, making new purchases on credit, and using the avails in part to pay existing debts ; ten months afterwards he failed. The conveyance was of course

indicate fraud should be proved. 'To show any existing debts, however trifling and inevitable . . . would not surely support a presumption of fraud in fact ; no voluntary settlement in any possible case could stand, upon that construction.' And he now draws the distinction stated in the text, between prior and subsequent creditors. As to the former a voluntary conveyance in his view was fraudulent as a matter of law ; as to the latter there was 'no such necessary legal presumption, and there must be proof of fraud in fact ; and the in-

debtedness at the time, though not amounting to insolvency, must be such as to warrant such conclusion.'

¹ *Clafin v. Mesa*, 30 N. J. Eq. 211 ; *Seals v. Robinson*, 75 Ala. 363 ; *Lawson v. Alabama Warehouse Co.* 73 Ala. 289 ; *Huggins v. Perrine*, 30 Ala. 396 ; *Stiles v. Lightfoot*, 26 Ala. 443. See also ante, p. 83, note 2.

² *Wadsworth v. Havens*, 3 Wend. 411.

³ *Richardson v. Smallwood, Jacob*, 552, ante, p. 96, note 3.

⁴ *Savage v. Murphy*, 34 N. Y. 508 ; affirming 8 Bosw. 75.

held invalid towards subsequent creditors; it was plain that there was an intention to defraud them if the business should not prosper. In an elaborate opinion in the Superior Court by Mr. Justice Hoffman the case is put thus: Were there existing creditors, it was asked, who could have set aside the conveyance? Had the debtor continued in debt to others who could have set it aside even if the original creditors had been paid off? Were there successive creditors as to whom it would have been void?

This however falls short of the English doctrine finally laid down; it is only the well-settled case of the right of future creditors to have conveyances made in contemplation of future debts annulled.¹ But the doctrine that a voluntary conveyance, invalid against existing creditors, or a conveyance with intent to delay or defraud existing creditors only, is equally invalid against future creditors, where prior debts remain unpaid, has been laid down by different courts in this country;² and sometimes, incautiously, without the qualification in regard to prior debts remaining unpaid.³

¹ *Carter v. Grimshaw*, 49 N. H. 100; *Gray*, 515; *Parkman v. Welch*, 19 Pick. 231, 237; *Clark v. French*, 23 Maine, 221, 228. The opinion of Mr. Justice Story also, it seems, was on this side. *Equity*, § 361. The author may be permitted to add that at the time when the notes to the 13th ed. of Story's *Equity* were written (1 Story, p. 365), he had not examined the subject as fully as he has since, and there merely repeated notes of previous editions. See also the remarks in vol. 1, p. 198, 199, note, of this work.

² *Ridgeway v. Underwood*, 4 Wash. C. C. 137, on authority of Chancellor Kent's decision in *Reade v. Livingston*, *supra*; *Redfield v. Buck*, 35 Conn. 328, on same authority; *Bassett v. McKenna*, 52 Conn. 437 (fraudulent intent shown); *McLane v. Johnson*, 43 Vt. 48; *Silverman v. Greaser*, 29 W. Va. 550; *Lockhart v. Beckly*, 10 W. Va. 87; *Claffin v. Mess*, 30 N. J. Eq. 211; *Allaire v. Day*, *ib.* 231; *Toney v. McGehee*, 38 Ark. 419; *Wilson v. Buchanan*, 7 Gratt. 334; *Pratt v. Cox*, 22 Gratt. 330; *Morrill v. Kilner*, 113 Ill. 318; *Bittenger v. Kasten*, 111 Ill. 260; *Pelham v. Aldrich*, 8

³ Indeed that is true of most of the cases just cited, though not where, as in the New Jersey cases, it was necessary to consider the point. If fraud was in point of fact intended upon future creditors, it is of course immaterial whether there were debts due to prior creditors.

Against these authorities are to be set the decisions of the courts of Pennsylvania,¹ Alabama,² Mississippi,³ and one or two other states.⁴ In the case first cited the judge at the trial had instructed the jury, in conformity with instructions given by Mr. Justice Duncan in 1826,⁵ that where there were debts existing at the time of the (voluntary) conveyance, and their recovery was hindered thereby, that circumstance raised a suspicion of fraud from which an intent to defraud subsequent as well as existing creditors might be inferred. But this was held erroneous; the Supreme Court declaring that the statute of 13th Elizabeth did not make a voluntary conveyance void against subsequent creditors merely because it was void against prior creditors. The fraud must be practised upon the subsequent creditors to enable them to impeach the conveyance;⁶ and the fact that existing creditors could set aside a deed as fraudulent was not even *prima facie* evidence in favor of a subsequent creditor.⁷ So in Alabama it is laid down that a gift by a husband to his wife, if not made with fraudulent intent towards future creditors, can be set aside only at the suit of existing creditors;⁸ though if

¹ Haak's Appeal, 100 Penn. St. 59; Bruner, 89 Ind. 556 (statute); Horn v. Kimble v. Smith, 95 Penn. St. 69; Harlan v. Maglaughlin, 90 Penn. St. 293; Snyder v. Christ, 3 Wright, 499; Monroe v. Smith, 79 Penn. St. 459; Reid v. Gray, 37 Penn. St. 508. See Henon v. McClane, 88 Penn. St. 219. Formerly there was a near approach to the English law. Thomson v. Dougherty, 12 Serg. & R. 448.

² Davidson v. Lanier, 51 Ala. 318; Kirksey v. Snedecor, 60 Ala. 192.

³ Simmons v. Ingram, 60 Miss. 886.

⁴ See Bayha v. Kessler, 79 Mo. 555; Sheppard v. Thomas, 24 Kans. 780; Hixon v. George, 18 Kans. 253; Hilton v. Morse, 75 Maine, 258; French v. Holmes, 67 Maine, 186; McLean v. Weeks, 65 Maine, 411; Stumph v.

Bruner, 89 Ind. 556 (statute); Horn v. Volcano Water Co. 13 Cal. 62.

⁵ Thomson v. Dougherty, *supra*.

⁶ See e. g. Mowry's Appeal, 94 Penn. St. 376.

⁷ Contra, Horn v. Volcano Water Co. 13 Cal. 62.

⁸ Davidson v. Lanier, *supra*. The court says that the statute 'has reference to existing creditors, and not to future creditors, unless the conveyance is a contrivance to hinder and delay or defraud future creditors.' Language to the like effect occurs in Kirksey v. Snedecor, *supra*, Lawson v. Alabama Warehouse Co. 73 Ala. 289, Seals v. Robinson, 75 Ala. 363, and in Horbach v. Hill, 112 U. S. 144. See also Moore v. Page, 111 U. S. 117; Claflin v. Mess,

there was actual fraud future as well as present creditors may impeach the conveyance.¹

In Massachusetts too a rule which at first appears to differ from the English rule seems to have become settled, to this effect: If the debtor made the voluntary conveyance with 'intent to defraud,' — an expression exemplified by a conveyance with a secret trust, unexplained, in favor of the debtor,² or by a conveyance made to avoid a judgment,³ — subsequent creditors and purchasers may avail themselves of the fraud to set aside the deed; but if the conveyance was 'voluntary only, and made without fraudulent intent,' it may be avoided only by creditors of the time of making it.⁴ Chief Justice Shaw declared this to be a 'well-settled' rule. But the case cited for it,⁵ and the decisions on which that case was founded,⁶ were cases of subsequent purchasers; and they had not professed to lay down any rule in regard to subsequent creditors. The distinction therefore was not already 'well-settled;' and if what has been said in this discussion is sound, it was, if the language were taken in its most natural sense, an unfortunate distinction.

30 N. J. Eq. 211. Subsequent creditors cannot participate with existing creditors, in Alabama, in the benefits resulting from the latter's procuring a conveyance to be set aside, where no fraud is intended upon the subsequent creditors. *Kirksey v. Snedecor*, *supra*. This is a sound conclusion from the rule.

¹ *Seals v. Robinson*, 75 Ala. 363. That would be generally accepted law, except in Pennsylvania. See *Wilcoxon v. Morgan*, 2 Col. 473, and cases cited; also cases *infra*, *passim*.

² *Oriental Bank v. Haskins*, 3 Met. 332.

³ *Livermore v. Boutelle*, 11 Gray, 217.

⁴ *Pelham v. Aldrich*, 8 Gray, 515, 517 (referring to *Beal v. Warren*, 2 Gray, 447, a case of subsequent *pur-*

chaser); *Day v. Cooley*, 118 Mass. 524; *Wadsworth v. Williams*, 100 Mass. 126; *Claffin v. Mess*, 30 N. J. Eq. 211; *Converse v. Hartley*, 31 Conn. 372; *Adams v. Collier*, 122 U. S. 382, 391 (dictum, citing *Warren v. Moody*, *ib.* 182, a case not in point. It is difficult to understand the paragraph in which *Warren v. Moody* is cited). See also *Horbach v. Hill*, 112 U. S. 144; *McLane v. Johnson*, 43 Vt. 48.

⁵ *Beal v. Warren*, *supra*.

⁶ *Clapp v. Leatherbee*, 18 Pick. 131; *Ricker v. Ham*, 14 Mass. 137. In *Parkman v. Welch*, 19 Pick. 231, 237, however, Dewey, J. speaks of such a rule as prevailing 'in England and in several of the states of the Union,' and as 'recognized' in several Massachusetts cases. Sed quære, except with the

The latter part of the rule, like the rule in the Pennsylvania cases, would in its natural sense deny the doctrine of equity that upon a successful impeachment of the fraudulent conveyance, by a decree in favor of existing creditors after the subsequent debts have been created, all creditors, subsequent as well as prior to the conveyance, are let in; or if not that, it makes the equity of the subsequent creditors dependent upon the will of those of the time of the conveyance.¹ But the rule in question is not so discriminating against future creditors as it appears on its face; for it is laid down that in cases in which a voluntary conveyance is by Massachusetts law evidence of fraud upon existing creditors, it is equally evidence of fraud upon future creditors.² The result

explanation in the next paragraph of the text.

¹ The difficulty which the case creates arises from taking the words 'intent to defraud' in their popular sense. Taken in their technical sense, there is an intent to defraud in every voluntary conveyance which defeats or delays creditors. Existing creditors are defrauded; and if existing, then subsequent creditors, since equity lets them in when the former have set aside the deed. *Freeman v. Pope*, L. R. 5 Ch. 538.

It is very important to be on one's guard against the bearing of cases of subsequent purchasers upon the rights of subsequent creditors. The statute of 13th Elizabeth does not concern (except by proviso) purchasers, but creditors. *Foster v. Walton*, 5 Watts, 378; *Douglas v. Dunlap*, 10 Ohio, 162; and other cases without number, English as well as American. The case of purchasers falls under the other statute, 27 Eliz. c. 4. In most of our states a voluntary conveyance will prevail over a subsequent purchase with notice, though for value. See e. g. *Sanger v. Eastwood*, 19 Wend. 514; *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 499. But that is no rea-

son why it should prevail over the rights of a subsequent creditor; these rights are of a very different nature. See however *Bank of Alexandria v. Patton*, supra, where a subsequent creditor with notice of a voluntary conveyance by the debtor is treated as on the footing of a subsequent purchaser. See also *Graham v. La Crosse Ry. Co.* 102 U. S. 148. In England a subsequent purchaser for value in good faith, even with notice, will prevail over a prior voluntary grantee. *Doe v. Manning*, 9 East, 59; *Doe v. Rusham*, 17 Q. B. 723; *Clarke v. Wright*, 6 Hurl. & N. 849; *Bayspoole v. Collins*, L. R. 6 Ch. 232; *May, Fraudulent Conv.* 193, 2d ed. But no ruling in favor of subsequent creditors was ever founded there upon that consideration. See chapter 21.

² *Day v. Cooley*, 118 Mass. 524; *Redfield v. Buck*, 35 Conn. 328; *Winchester v. Charter*, 12 Allen, 606, 609 (see s. c. 102 Mass. 272). 'Nor would this presumption of fraud [arising from an excessive voluntary conveyance] be confined in its effect to pre-existing creditors. It would be equally strong as to those whose debts were subsequently contracted, because

appears to be that the rule in Massachusetts, as now interpreted, conforms substantially to the English law.

The weight of authority indeed in this country is clearly on the side of the English rule, not quite as laid down by Vice Chancellor Kindersley, but substantially as expressed by Chancellor Kent. We have seen that one intimation of substance in the opinion of the first-named judge was advanced with hesitation, to wit; that if at the time of filing a bill by a subsequent creditor no debt due at the execution of the deed attacked remains unpaid, the bill cannot be sustained (unless some other ground appear than the indebtedness of the grantor when he executed the deed). As this intimation stands, there is room in principle for doubting its correctness. The subsequent creditor may not have discovered the fraud until all the debts of the time of the conveyance have been paid, and may not have been at fault for not discovering the fact, if that could make any difference; surely in such a case his right to proceed against the conveyance could not be lost. If he can have waived his right by delay after knowledge, the case will be different; but recent English authority has in the broadest terms repudiated the idea of the need of showing an unpaid debt due, at the time of *suit*, to a prior creditor.¹ Enough that there were once creditors, of the time

a transfer of property under such circumstances affords a reasonable ground of presumption that the intent with which it was made was to put beyond the reach of creditors, future as well as present, the fund or capital to which they had a right to resort for the payment of their debts.' Bigelow, C. J. So held in New Jersey also. *Claffin v. Mess*, 30 N. J. Eq. 211, in which, after declaring that 'fraud in fact' must be shown by future creditors, it is explained that such 'may be considered found when it appears that, after deducting the property which is the subject of the gift, the grantor has

not retained sufficient available assets for the payment of his debts.' And for this the English case affirming the rule of Vice Chancellor Kindersley is cited. *Freeman v. Pope*, L. R. 5 Ch. 538, 544. See also *Toney v. McGehee*, 38 Ark. 419. The New Jersey court further says that actual fraud, for such purpose, 'may also be inferred in case the grantor retains sufficient property to pay his debts, but does not actually pay them, but applies his property to some other use. *Spirett v. Willows*, 3 De G. J. & S. 302.'

¹ *Taylor v. Coenen*, 1 Ch. D. 636; *Ex parte Russell*, 9 Ch. D. 588, C. A.

of the conveyance and until after the subsequent creditor's claim accrued, who could have had the conveyance set aside; that is, the test is, was the settlor at the time, towards creditors thus continuing, in a position to make the settlement? or if he was, so far as solvency was concerned, was the gift made in contemplation of insolvency?¹ This, it will be seen, puts the rights of subsequent creditors upon the same footing broadly with those of existing creditors.²

The opinion of Chancellor Kent, founded upon the English rule deduced from the authorities of his time, is in substantial accord with the later English authorities as well. The subsequent creditor, according to Chancellor Kent, must go far enough to show debts sufficient to create reasonable evidence of fraud, i. e. fraud upon existing creditors; further he need not go, so far as regards the amount of the debts. What will raise such evidence we have already seen.³ Of course a voluntary conveyance is not invalid against subsequent creditors, in the absence of fraud practised towards them, if it is valid against existing creditors.⁴ Thus a man

The court in the first case refers to *Martyn v. McNamara*, 4 Dru. & War. 411; *Crossley v. Ellworthy*, L. R. 14 Eq. 158; *Townsend v. Westacott*, 2 Beav. 340.

¹ *Taylor v. Coenen*, supra.

² The result appears to be that the distinction taken in *Spirett v. Williams*, 8 De G. J. & S. 293, is overturned. It was there said that existing creditors, attacking a voluntary settlement, by which their remedy was delayed, need not show that the gift made the debtor insolvent; but secus of subsequent creditors, unless they could show an express intent to delay them. Comp. the unsuccessful distinction of Chancellor Kent in *Reade v. Livingston*, 8 Johns. Ch. 481, 500, supra, p. 100.

³ Ante, pp. 82, 83. See also the next chapter.

⁴ *Thacher v. Phinney*, 7 Allen, 146, 150; *Norton v. Norton*, 5 Cush. 524, 529; *Sexton v. Wheaton*, 8 Wheat. 229; *Graham v. La Crosse Ry. Co.* 102 U. S. 148; *Adams v. Collier*, 122 U. S. 382 (qu. as to next to last paragraph of this case); *Mattingly v. Nye*, 8 Wall. 370; *Curtis v. Fox*, 47 N. Y. 299; *Sanderson v. Streeter*, 14 Kans. 458; *Lloyd v. Bunce*, 41 Iowa, 660; *Brown v. Vandermeulen*, 44 Mich. 522; *Gilligan v. Lord*, 51 Conn. 562. There is no distinction between corporations and individuals in this respect. *Graham v. La Crosse Ry. Co.* supra. It is not enough to show that the conveyance was voluntary. *Walker v. Bollman*, 22 S. Car. 512.

not in debt may make a voluntary conveyance which will be good against his future creditors.¹

But assuming the case to be one in which existing creditors could have invalidated the transaction, the matter is then, in regard to proceedings by subsequent creditors, to be looked at from the point of view of an ultimate distribution in equity, or in bankruptcy, of an insolvent estate; that is what it might come to, and that would be a case for a sharing by subsequent as well as by prior debtors. This, it is believed, is the true rule.²

It should be well observed however that the prior credits should have overlapped the subsequent ones; that is, debts contracted before the conveyance must have remained unpaid, not indeed at the time of the subsequent creditor's suit,³ but at the time when the debt to him was created.⁴ It is only upon this footing that the subsequent creditor can have an equity.⁵ If it were broadly true that the test is whether the debtor was, at the time of the voluntary conveyance, in a position to make it in justice to his creditors, as in these cases it has sometimes been incautiously put,⁶ it would result that subsequent creditors, whose demands arose at any time, how-

¹ See e. g. *Gilligan v. Lord*, *supra*.

² This, it will be seen, does not touch such questions as the right of a particular creditor by 'superior diligence' in uncovering or otherwise reaching property of the debtor. A subsequent creditor might have the benefit of that, as well as a prior creditor. And rights of that kind might have to give way in bankruptcy. The subject of the text is of the rights of subsequent creditors unaffected by questions of the rights of scramblers. The situation is to be looked at from the point of view of a possible distribution in bankruptcy or the like; this regardless of the fact that a single creditor may by 'superior diligence' cut the ground away from other

creditors, as in *Todd v. Neal*, 49 Ala. 266.

³ But see *Claffin v. Mess*, 30 N. J. Eq. 211.

⁴ *Claffin v. Mess*, *supra*, is a very valuable case upon this point, but the court incautiously adopt the older dicta, of debts remaining unpaid at the time of the subsequent creditor's suit.

⁵ 'There was no proof of any outstanding debts when the plaintiff's suit was commenced, nor when Toney [the grantor] became indebted to them.' *Toney v. McGehee*, 38 Ark. 419.

⁶ *Taylor v. Coenen*, 1 Ch. D. 636, Malins, V. C. Of course that way of putting the test is proper as to existing creditors' rights.

ever long, and whatever may have happened, after the conveyance, could have the same set aside. The debts of the time of the conveyance may have been paid off years before the credit in question was given, and the grantor meantime have enjoyed a long period of solvency and prosperity.¹ The old voluntary conveyance would now be as good at least as subsequent voluntary conveyances made in his solvency and not affecting creditors.

Assuming that there is no other ground for defeating a voluntary conveyance, at the suit of a subsequent creditor, than the fact that there are existing creditors, it must further be observed that it will not do to say that a gift even of the entire estate of a then debtor will make a case for the subsequent creditor; for it may not make a case for the existing creditors. It may be that he is well secured by mortgage or other lien. The gift must, as has been before intimated, be invalid towards existing creditors, in order to make a case for future creditors if they have no other ground of objection.²

Another sort of case has arisen touching subsequent creditors. Let it be supposed that a man not indebted in the ordinary sense makes a voluntary conveyance after suit begun against him for alleged breach of contract, or for tort, in which the amount of damages to be recovered, even if the suit succeed, is wholly uncertain,—it may be very small, it may be considerable;³ now assuming that the gift was not made

¹ The test of the condition of the debtor is to be applied as of the time of the gift. *Rose v. Colter*, 76 Ind. 590.

² *Nippes's Appeal*, 75 Penn. St. 472. *Sharswood, J.*: 'But the debt to R clearly was not such a debt as would render the conveyance [voluntary settlement upon the grantor's wife of all his property] void as against subsequent creditors. *Williams v. Davis*, 19 P. F. Smith, 21. It was secured by a judgment which was a lien on the settled land. The deed could not have been

intended to hinder, delay, and defraud that creditor, the vendor, for the wife took the land subject to the lien of the judgment given to secure its payment. There was then no prior debt upon the ground of which the subsequent creditors could come in.'

³ 'It must be remembered that the settlor had no creditor whatever at the time when the settlement was made. He had no debt. There was merely a liability which might or might not result in a debt.' *Cave, J. in Ex parte*

with any reference to the suit, and that after judgment for the plaintiff the defendant becomes insolvent, is the gift a fraud upon the plaintiff's rights?

A question of the kind was raised in a case¹ the facts of which should be stated. The captain of a merchantman was married at Hong Kong on May 31, 1881. In the month of August following he was sued in England for breach of promise of marriage, and the writ was served in Hong Kong on October 8, of that year. At the time of the marriage the captain was entitled to a legacy of £500, which had become vested May 11, 1881. On October 17, 1881, being still at Hong Kong the captain made a voluntary settlement of the legacy for his wife during the marriage, remainder for the survivor, remainder for their children or in default of children for himself. The plaintiff in the suit for breach of promise obtained judgment for £500 on July 20, 1882; and in November, 1884, the captain was adjudged bankrupt. At the time of executing the settlement he was able to pay his debts without the aid of the property thereby given;² he did not know

Mercer, 17 Ch. D. 290, 294, *infra*, a case of voluntary settlement pending a suit for breach of promise of marriage. See also the language of Grantham, J. at p. 296, distinguishing *Crossley v. Ellworthy*, L. R. 12 Eq. 158; *Hill v. Bowman*, 35 Mich. 191; *Richardson v. Smallwood*, Jacob, 552, *ante*, p. 96; *Pelham v. Aldrich*, 8 Gray, 515, judgment for costs against a grantor after a conveyance, in good faith, for value, 'though perhaps not adequate,' the conveyance being sustained. Secus if the conveyance was made to defeat execution for the expected costs. *Stevens v. Works*, 81 Ind. 445. So of course if the conveyance was made to defeat an anticipated or a possible judgment for damages, as e. g. in tort, the case will be within the statute; for the statute is directed against alienations to hinder or

defraud creditors 'and others.' *Manuf. Co. v. Waldron*, 75 Maine, 472; *Walde v. Scotten*, 59 Md. 72; *Weir v. Day*, 57 Iowa, 84; *Corder v. Williams*, 40 Iowa, 582; *Bongard v. Block*, 81 Ill. 186; *Bishop v. Redmond*, 83 Ind. 157; *Gebhardt v. Merfeld*, 51 Md. 322; *Scott v. Hartman*, 26 N. J. Eq. 89. But see *contra* *Hill v. Bowman*, 35 Mich. 191. *Ex parte Mercer* is not *contra*, as the text shows.

An obligation need not be absolute or mature at the time of the conveyance. See *Jenkins v. Lockhard*, 66 Ala. 377 (surety); *Rynearson v. Turner*, 52 Mich. 7 (surety).

¹ *Ex parte Mercer*, 17 Q. B. D. 290, C. A.

² Not however including the sum recovered in the suit for breach of promise. See 17 Ch. D. at p. 297, top.

of the legacy until shortly before executing the deed ; and in that act he was not influenced by the suit begun against him.

The Court of Appeal, upon an attempt to have this settlement set aside, held that there had been no intent to hinder, delay, or defraud creditors within the statute of Elizabeth. The stress of the argument at the bar was that it was the necessary consequence of the deed to delay creditors,¹ and hence that an intent to delay creditors must be inferred.² But the court declined to take this view of the matter.³ The arguments of the judges ran on somewhat different lines, though turning mainly upon the meaning of the rule that a man is presumed to intend the necessary consequences of his acts. Lord Esher pointed out that the rule, in itself considered, was not to be taken as absolute ; where an intention was actually to be shown, the rule meant only that if nothing appeared in the case to the contrary, the conclusion must be drawn that the consequences were intended. But if in point of fact other circumstances in such a case appeared, at variance with the conclusion of the rule, those circumstances must be taken into consideration.⁴ Here however was no case for the rule of necessary consequences ; and the learned judge considered that it was necessary 'to find that there was an actual intent in the bankrupt's mind to defeat or delay his creditors, and,' he added, 'there is no evidence of such intent.'

Here then is an important qualification to the general doctrine in regard to intention to defraud ; and its soundness, as a general proposition, it would be difficult to question. The

¹ *Freeman v. Pope*, L. R. 5 Ch. 538 ; *Thompson v. Webster*, 7 Jur. N. S. 531, H. L.

² *Ib.* ; *Harman v. Haskins*, 56 Miss. 142 ; *Schuman v. Peddicord*, 50 Md. 560.

³ *Lopes*, L. J. : 'It cannot according to my view be said that it was the necessary consequence of this voluntary settlement to defeat or hinder the set-

tlor's creditors. The only suggested creditor is' the plaintiff in the suit for breach of promise. 'There are many reasons why it was not a necessary consequence of the settlement that her claim should be defeated. The action might have failed for various reasons.'

⁴ See also *In re Johnson*, 20 Ch. D. 389, 394, Fry, J.

gift has no effect, in itself, towards delaying creditors; so far then it falls without the purview of a statute intended to aid creditors in the pursuit of their debts; hence anything short of actual fraud may well be dismissed from notice. Indeed even actual fraud could scarcely be noticed in such a case except in virtue of statute; for as the gift did not have the proper effect of delaying creditors, it was '*injuria sine damno*.'

But while this is all clear enough, it may be suggested that Lord Esher's language above quoted appears rather strong. Assuming that a case of the kind may fall within the statute of Elizabeth, can it be necessary to prove 'an actual intent in the' debtor's 'mind to defeat or delay his creditors'? Suppose creditor A, attacking the gift, were able to prove that the debtor intended to defeat or delay creditor B, who happened to know where the debtor had other property in reach, ample to pay all his debts; the gift would still be a fraud upon B under the statute, though it did not have the effect to delay him; and if a fraud upon B, then a fraud upon A, though there was no 'actual intent' in the debtor's mind to delay him.

Thus far of the operation of the statute upon subsequent creditors in cases of fraud upon existing creditors; which brings us to the consideration of cases in which fraud is practised directly upon subsequent creditors. And here we touch the statute at a vital point in regard to the nature of fraud; the question being what has been considered sufficient to constitute the wrong where there is no question of fraud upon existing creditors.

The first case to be noticed is the retaining of possession of, or the reservation of a trust in property conveyed absolutely by, a debtor. Of the general doctrines of the law concerning the effect of retaining possession much will be said in a later chapter; here it will be enough to say that where such an act would operate as a fraud upon creditors of the time of the deed, it will operate equally as a fraud upon those who may afterwards become creditors, for the situation is

continuing. It may operate as a fraud quite as much in the future, so long as the situation remains, as at the time when it was made.¹ In some states there would arise an inference of fraud as matter of law, where the conveyance was absolute; in others there would arise a *prima facie* presumption of fraud.² In the one case the inference could not be gainsaid, whatever the actual intention; in the other the inference would stand unless satisfactory evidence, by way of explanation, and not merely of a good motive,³ were forthcoming to rebut it. In either case then 'intent to hinder, delay, or defraud' might be established, though in point of fact there was no such intent.⁴

The same might be true of one who, in good credit at the time, should make a voluntary conveyance of a considerable part of his property, and shortly afterwards embark in some hazardous business. The grantor might have made the conveyance with perfectly upright motives, intending and expecting to be able to meet all his coming liabilities; but that would not protect the grantee. In many cases of the kind there will be fair ground for believing that the grantor meditated a fraud upon his possible future creditors; it will appear that he intended, in case his venture should prove disastrous, to keep his property beyond the reach of creditors;⁵

¹ *Parkman v. Welch*, 19 Pick. 231; *Clark v. French*, 23 Maine, 221; *Savage v. Murphy*, 34 N. Y. 508; *Shand v. Hanley*, 71 N. Y. 319; *Young v. Heermans*, 66 N. Y. 374; *Case v. Phelps*, 39 N. Y. 164; *Cheatham v. Hawkins*, 80 N. Car. 161; s. c. 76 N. Car. 335; see *Revised Code of Alabama*, § 1861; *Reynolds v. Crook*, 31 Ala. 634; *Miller v. Stetson*, 32 Ala. 161; *King v. Kenan*, 38 Ala. 63; *Mowry's Appeal*, 94 Penn. St. 376; *Levering v. Norvell*, 9 Baxt. 76; *Matthai v. Heather*, 57 Md. 483; *Lucas v. Lucas*, 103 Ill. 121.

² Indeed the case may be such as to

be treated as fraud *per se* even in a state in which conveyances of the kind are ordinarily but *prima facie* fraudulent. *Young v. Heermans*, 66 N. Y. 374.

³ See *Cheatham v. Hawkins*, 80 N. Car. 161; *Cole v. Tyler*, 65 N. Y. 73; cases of existing creditors.

⁴ *Ib.*

⁵ The grantor virtually says: 'If I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss.' 'That is the very thing which the statute of Elizabeth was meant to prevent.'

but, it seems, this need not be the case. The debtor may not have contemplated the venture at all when he made the gift; or if he did contemplate it, he may have considered himself secure from loss in the nature of the arrangements made or to be made. But the conveyance would, except perhaps in Pennsylvania,¹ be held to fall within the meaning of the statute of Elizabeth, assuming that there was a sufficiently close relation between the conveyance and the disastrous result of the adventure.²

The qualification just made is very material, as the case cited shows. The plaintiff filed a bill to subject a house and lot to the payment of a debt upon which he had recovered a judgment against the husband of the grantee; both the grantor and the grantee being parties defendant to the bill. The bill alleged that the grantor, contemplating carrying on business as a merchant, procured the property to be conveyed to his wife, and to obtain credit with the house of the plaintiff represented that he was possessed of a considerable property, embracing the premises in question. It was also charged that the wife was privy to the fraud, but that was not made out, nor was the allegation that the husband contemplated trade when the deed was made. There was no allegation that the husband was indebted at the time of the settlement,

Jessel, M. R. in *Ex parte Russell*, 19 Ch. D. 588, C. A., referring to *Mackay v. Douglas*, L. R. 14 Eq. 106. See also *Savage v. Murphy*, 34 N. Y. 508; *Dygart v. Remerschneider*, 32 N. Y. 629; *Case v. Phelps*, 39 N. Y. 164; *Young v. Heermans*, 66 N. Y. 374; *Carpenter v. Roe*, 10 N. Y. 227; *Monroe v. Smith*, 79 Penn. St. 459; *Nippes's Appeal*, 75 Penn. St. 472; *Claffin v. Mess*, 30 N. J. Eq. 211; *Cramer v. Reford*, 2 C. E. Green, 383; *Fisher v. Lewis*, 69 Mo. 629; *Thomson v. Dougherty*, 12 Serg. & R. 448. It is not necessary that there should be any intent to defraud

present creditors in such a case. *Case v. Phelps*, supra.

¹ 'It is properly said in *Williams v. Davis*, 19 P. F. Smith, 21, that even an expectation of future indebtedness will not render a voluntary conveyance void where there is no fraud intended by such conveyance.' Gordon, J. in *Harlan v. Maglaughlin*, 90 Penn. St. 293, 297. It is believed that no other respectable court would go that length. Nor was the law so regarded in the time of *Thomson v. Dougherty*, 12 Serg. & R. 448.

² See *Sexton v. Wheaton*, 8 Wheat. 229.

and none of the debts in question were contracted before the husband entered into the business in question, and that was more than two years after the conveyance. Four years or more after the conveyance, as the result of the business undertaken, the husband became insolvent. The bill was dismissed. The court, by Chief Justice Marshall, appears to have taken a distinction, as the supposed result of the English authorities, in respect of voluntary conveyances in favor of a wife or child, which we have seen has been repudiated, but decided the case mainly upon the ground that there was no connection between the failure of the husband and the making the settlement.¹

It is important finally to notice that the statute is satisfied with an intent to delay; its language being 'intent to hinder, delay, or defraud.' The consequence is that in no case can it be necessary to show a purpose to defraud in the popular sense of the word. The grantor may honestly intend to pay all his debts, and honestly believe that the particular course taken by him will work best to that end; but he is not to be judge in respect of the creditor's interests.² In a case³ of replevin, in which the plaintiff claimed the goods as purchaser for value from the debtor, an instruction to this effect was upheld: A conveyance of property by a debtor in embarrassed circumstances, for the purpose of securing the

¹ In regard to supposed badges of fraud and the period between the settlement and the failure the Chief Justice said: 'We admit that these two circumstances ought to be taken into view together, but do not think that as the case stands they establish fraud. There is no allegation in the bill . . . that any of the debts which pressed upon Wheaton at the time of his failure were contracted before he entered into commerce, in 1809, which was more than two years after the execution of

the deed. It appears that at the date of its execution he had no view to trade. Although his failure was not very remote from the date of the deed, yet the debts and the deed can in no manner be connected with each other; they are as distinct as if they had been a century apart.' See also *Matthai v. Heather*, 57 Md. 483, and *quære* as to it.

² *Kimball v. Thompson*, 4 Cush. 441; *Lehman v. Kelley*, 68 Ala. 192; *Roberts v. Radcliff*, 35 Kana. 502.

³ *Kimball v. Thompson*, *supra*.

same from attachment, the purpose being known to the purchaser, would be void against creditors, though the debtor might, at the time, have believed that it would be better for his creditors that the conveyance should be made, and intended in the end that his creditors should be paid.

§ 7. CONCLUSIONS.

The ground of construction has only been partly entered upon as yet, but the subjects examined are fairly representative; so that, it is believed, we may now safely and usefully draw some conclusions in regard to the application of the rule of construction to the statute of 13th Elizabeth, and generally speaking to all other statutes for the repression or redress of fraud : —

1. The rule that statutes against fraud are to be liberally construed means that the law is to be construed in accordance with its spirit, not jealously according to its letter, especially not subject to the limitations put upon statutes in derogation of the common law; everything which the law may fairly embrace is within it.

2. But this does not mean that the courts are permitted in enforcing the law to treat fraudulent conduct touching transfers of property, as unlawful, so as to give rights of substantive law to persons towards whom such conduct is practised which they would not otherwise have had. The courts may not, under the rule of liberal construction, make additions to the law; that would be to legislate, not to construe; nay, it would be to override legislation. The authority for their decisions must be found within the natural meaning of the statute itself.

3. The statute will open of itself to meet the extension of rights by later law, or the rise of new rights not known at the time when it was enacted; the courts are not bound down to the objects which the legislature may have had in mind when the statute was passed.

4. The courts have the right, and it is their duty, subject to the foregoing statements, to construe the law with reference to the present demands of society, if there is nothing opposed to this in the statute; and this even to the extent of enlarging the ordinary meaning of the word 'fraud' and of such words as 'intent to defraud.'

Concerning the last of these conclusions it is important to emphasize the fact that the courts in modern times have not shrunk from giving a meaning to the words of the statute which may not have been contemplated by those who framed it; some of the authorities already cited plainly avow the fact.¹ The courts never inquire what the words meant in the time of Elizabeth. This is treating statute, so far, much as if it were a judicial declaration of common law, and it may appear indeed to border upon legislation, but it is thoroughly legitimated in regard to the statutes of Elizabeth at all events; indeed it is not so exceptional as to be at all remarkable. Much of the law has been built up of interpretation of that kind. But the fourth conclusion is subject, it should be observed, to the preceding ones, especially to the second.

5. It is established that 'intent to defraud' does not mean personal intent, though proof of such intent would of course be enough; and the personal test being thus discarded, it results that the test is external. If a debtor's conveyance, made in good faith, upon a good motive, is by the law rightly declared fraudulent, and not merely unlawful, it must be because it conflicts with the common conscience. The external standard has not been formally declared, but it has practically been reached.

¹ 'We have therefore to deal with the case of an honest man, not in fact indebted at all, and the question is whether we are driven (not by the statute of Elizabeth, but by a series of decisions upon it) to say that the settlement cannot stand.' Lindley, L. J. in *Ex parte Mercer*, 17 Q. B. D. 290.

The statement in parenthesis is the one to be noticed; and the learned judge adds that voluntary settlements have been set aside 'under the statute as it has been construed for a great number of years, in cases in which there was no actual intent to defraud.'

It should be added that the distinction often taken between fraud in law and fraud in fact is quite consistent with the conclusions reached. That distinction is put as strongly as it may be by Mr. Justice Thompson, in a Pennsylvania case.¹ 'The difference between fraud in law and fraud in fact is very marked. . . . Certain indicia being established, or capable of being so, its presence is determinable as matter of law, by the court, regardless of any evil intent on the part of the agents engaged in it. But fraud in fact rests mainly upon the fraudulent intent, and the facts establishing this are necessary for the jury, and must be clearly found.'² But this is not to say that where it is a question of fact, fraud in the individual's mind must be found; the question is whether the average man would have been guilty of fraud upon the facts shown,—what do the jurymen as representing the average man think of the matter? The standard of the average man is the test whether the jury or the judge have the decision, unless some other test is prescribed or allowed by law.³

In some cases the common conscience is expressed by a positive rule of law, in some by a presumption, in some it

¹ *Milne v. Henry*, 40 Penn. St. 352.

² Vol. 1, p. 139. See also *Lawson v. Funk*, 108 Ill. 502; *Moore v. Wood*, 100 Ill. 451; *Coburn v. Pickering*, 3 N. H. 415.

³ Thus it can make no difference what the average man would have 'intended' if it be shown that the debtor in point of fact intended to defraud. Individual fraud is a rightful test, not a required one, under the statute.

For the general aspects of this external standard doctrine the reader should go to the expounder of it, Holmes, on the Common Law. See pp. 49, 131 et seq. In regard to its criminal aspect see especially Mr. Justice Holmes' opin-

ion in *Commonwealth v. Pierce*, 138 Mass. 165; and further see *White v. Duggan*, 140 Mass. 18, 20, where the same learned judge thus goes to the marrow of the subject: 'As was pointed out in *Commonwealth v. Pierce*, 138 Mass. 165, the difference between intent and negligence, in a legal sense, is ordinarily nothing but the difference in the probability, under the circumstances known to the actor and according to common experience, that a certain consequence, or class of consequences, will follow from a certain act.' That difference may however be the difference between manslaughter and murder. *Commonwealth v. Pierce*.

is not formulated at all. In other words we have three classes of cases to deal with in relation to this matter of the intent to hinder, delay, or defraud: (1) Cases in which the law itself raises a conclusive presumption or inference of fraud; (2) cases in which the law raises a *prima facie* presumption of fraud; (3) cases in which no presumption at all is raised, the whole matter being left to the jury, or in non-jury cases to the judge, to be considered as a simple question of fact. The subject of the intent of the statute will now be resumed with some regard to these divisions; the great examples of presumption, voluntary conveyances and conveyances showing fraud on their face, and absolute conveyances with retention of possession by the vendor or a secret trust on his behalf, being made the subjects of special consideration under heads of their own, and the great example of the other division, conveyances for value, following in the same way. But under each of these heads it will be necessary also to consider from time to time all three of the classes of cases above enumerated. From a practical point of view, which should be the governing consideration in a work of this kind, it will be best to follow the lines of the recognized heads of the law rather than the strictly logical ones indicated by the division; to do otherwise would require the splitting up and separation of the familiar titles of the law.

CHAPTER V.

ALIENATION.

HAVING considered the rule of construction to be applied to statutes for the repression and suppression of fraud, particularly as applied to the statute of 13th Elizabeth and the like American statutes, it would naturally follow that we should proceed to consider, in the first place, the subject-matter embraced within the statutes in hand, that is, the Res which the statutes seek to keep within the reach of creditors notwithstanding alienation of it by the owner. But that has been anticipated; we found it desirable at the outset of the examination of the rule of construction to ascertain whether the statute had affected the rights of creditors in the way of enlarging them.¹ The subject has therefore been once disposed of; and it may now be dismissed with the following summary:—

1. Whatever property would be subject, by process of any court, whether by execution or in any other way, as e. g. by compelling an assignment of a demand, to the claims of creditors ‘and others’ while in the hands of the debtor, comes, on alienation with ‘intent to delay, hinder, or defraud’ such persons, within the operation of the statute of 13th Elizabeth,² or at all events within the law against

¹ Anta, pp. 42–47.

² Anta, p. 43. Where a mortgage has been foreclosed, and there is a surplus after the sale, the same belongs to the mortgagor, and may be taken by his creditors, notwithstanding foreclosure without right of redemption. Hence

the surplus may be the subject of a conveyance in fraud of such creditors. *Judge v. Herbert*, 124 Mass. 330.

The assignment of unearned wages for value, with intent to defeat creditors, falls within the statute against fraudulent conveyances. *Gragg v. Mar-*

fraud.¹ 2. The value of the property cannot in ordinary cases be taken into account; that is, the alienee cannot show that the property conveyed to him was without value.² But things obviously trivial in value are not, it seems, within the meaning of the statute.³ 'De minimis non curat lex.' 3. The statute has not enlarged the substantive rights of creditors; creditors cannot disturb alienations of property not subject in any way, before alienation, to their claims, by showing that the alienation was made with intent to defeat them.⁴

The next question, naturally, relates to the various modes by which the debtor may seek to put his property beyond the reach of his creditors. These are described in the statute by a network of terms; 'feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, and chattels . . . lease, rent, common, or other profit or charge out of the same . . . bond, suit, judgment,⁵ and

tin, 12 Allen, 498. And this though the assignment was 'open.' *Ib.* So of husband's tenancy by curtesy initiate. *Gay v. Gay*, 123 Ill. 221. It is also held that an heir's expectant estate falls within the statute. *Read v. Mosby*, 87 Tenn. 759, overruling a dictum in *Fitzgerald v. Vestal*, 4 Sneed, 257, and distinguishing *Steele v. Frierson*, 85 Tenn. 435.

The rule of the text includes insurance coming to the debtor or to his estate. *Central Bank v. Hume*, 128 U. S. 195. But one's earnings may be used for obtaining moderate insurance on one's life, for one's family. *Ib.* As to merely personal rights of the debtor see post, p. 133.

¹ *Infra*, p. 123.

² *Parsell v. Patterson*, 47 Mich. 505, and *Baldwin v. Rogers*, 28 Minn. 544, are opposed to *Garrison v. Monaghan*, 33 Penn. St. 232; and they may well be doubted.

³ *Ante*, pp. 47 et seq.

⁴ *Ante*, pp. 51 et seq., 69 et seq.

⁵ Confession of judgment is one of the common devices of defrauding debtors. See e. g. *Candee v. Lord*, 2 Comst. 269; *Chappel v. Chappel*, 2 Kern. 215; *Dunham v. Waterman*, 17 N. Y. 9; *Acker v. Leland*, 109 N. Y. 5, 16; *Bunn v. Ahl*, 29 Penn. St. 387; *Beattie v. Pool*, 13 S. Car. 379 (for value); *Blum v. Schram*, 58 Texas, 524; *Sidensparker v. Sidensparker*, 52 Maine, 481; *Pickett v. Pipkin*, 64 Ala. 520; *Lawson v. Alabama Warehouse Co.*, 73 Ala. 289; *Swihart v. Spaner*, 24 Ohio St. 432; *Wingate v. Haywood*, 40 N. H. 437; *Bigelow, Estoppel*, 150, 151, 5th ed.

In *Bunn v. Ahl*, *supra*, the court says: 'A judgment obtained to defraud creditors must not be used even to obtain an unforbidden preference over them. The thing is voidable by them in whatever way it may be used to their prejudice, because it was made to defraud them.' Further see *Raynor v.*

execution.' The framer of a statute of the kind, in these days, would probably select some single, comprehensive, and familiar term for all this, and then, explaining the meaning to be given to it, would use that term alone throughout the statute. He might select for the purpose 'alienation;' that term at all events we now select for convenience, in the present chapter, in considering the subject proposed in the question. The question then is, what is meant by the term 'alienation' taken as a substitute for the words of the statute, apart from its use as a mere equivalent? That is, we have before us a question of construction. Some cases of the kind however must be reserved for special examination in chapters by themselves.¹

The language of our own statutes is not always so particularly descriptive as that of the statute of Elizabeth. The New York legislation, which has spread over a large part of the country, avoids in case of fraud 'Every conveyance or assignment in writing or otherwise . . . and every charge upon lands, goods,' etc., 'and every bond or other evidence of debt given, suit commenced, decree, or judgment.'² And so far as the word 'conveyance' is concerned the statute itself declares its meaning; it embraces 'every instrument in writing (except a last will and testament), whatever may be its form and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered.'³ Another statute, widely copied, of the same State, relating only to personalty, avoids 'All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, . . . made in trust for the use of the person making the same;' and the next section of the same statute designates 'Every sale . . . of goods . . . and

Mintzer, 67 Cal. 159; Ragland v. Cantrell, 49 Ala. 294.

¹ Such cases e. g. as alienations by debtors subject to trusts or reservations for themselves, and mortgages with re-

served powers of sale and enjoyment. See chapters 9, 10.

² Anta, pp. 84, 85.

³ Anta, p. 85.

every assignment of goods by way of mortgage or security,' as cases within its purview.¹

The statute of Alabama designates 'All deeds of gift, all conveyances, transfers, and assignments,' and 'All conveyances, or assignments in writing or otherwise . . . and every charge' upon property;² that of Arkansas, 'Every deed of gift and conveyance of goods and chattels in trust to the use of the' maker, and 'Every conveyance or assignment, in writing or otherwise . . . and every charge upon lands, goods,' etc., 'and every bond, suit, judgment, decree, or execution.'³ The statute of Connecticut designates 'All fraudulent conveyances, suits, judgments, executions, or contracts;'⁴ that of Georgia, 'Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment, and execution, or contract of any description,' and 'Every assignment or transfer by a debtor insolvent,' for creditors, 'where any trust or benefit is reserved,' etc., also 'every sale.'⁵ The statute of Illinois, 'Every gift, grant, conveyance, assignment, or transfer of, or any charge upon any estate . . . and every bond or other evidence of debt given, suit commenced, decree, or judgment suffered,' and 'All wills and testaments, limitations, dispositions, or appointments of' lands, etc., 'or charge out of the same;'⁶ that of Kentucky, 'Every gift, conveyance, assignment, or transfer of or charge upon any estate . . . and every bond or other evidence of debt given, action commenced, or judgment suffered,' and 'Every voluntary alienation or charge upon personal property,' etc.⁷ The statute of New Jersey, 'Every conveyance, grant, or alienation . . . by writing or otherwise, and every judgment and execution,' and 'Every deed of gift and every conveyance, transfer, and assignment of goods,' etc., 'in trust for the use of the' maker;⁸ that of Ohio, 'Every gift, grant, or convey-

¹ Anta, p. 36.

⁴ Ib. 546.

⁷ Ib. 563.

² Bigelow, Fraud, 535 (1877).

⁵ Ib. 553, 554.

⁸ Ib. 598.

³ Ib. 537.

⁶ Ib. 556, 557.

ance . . . and every bond, judgment, or execution, and 'All transfers, conveyances, or assignments.'¹

It would serve no useful purpose to go further. The statutes are similar to each other, and to their common original. None of them designates every possible mode of divesting one of property; the statute of Elizabeth, though rather more detailed, stops short of doing so. The question then arises whether every possible mode is covered by our statutes. There has been some diversity of judicial opinion upon this point; the case giving rise to the difficulty commonly being this: An insolvent debtor buys and pays for land, and has the title made to a third person, his wife, son, or friend. The courts have more generally refused to consider such a case as within the statutes;² sometimes pointing to the language which declares the obnoxious alienations 'void,' and saying that the result of applying the statute would only be to make title back in the grantor, not to give it to the debtor.³

This view of the statute however has not everywhere been accepted. It has been referred to as narrow construction, and so as opposed to the rule of construction which prevails generally in regard to statutes against fraud. Thus in Ohio, where it had been decided that a transaction of the kind was

¹ Bigelow, *Fraud*, 610, 611 (1877).

² For the cases see *infra*, p. 126, note. While the legal title remains in the third person, it is said that *his* creditors may take the land. *Stanton v. Shaw*, 3 Baxt. 12. See *Susong v. Williams*, 1 Heisk. 625; *Davis v. Graves*, 29 Barb. 485; *Powell v. Ivory*, 88 N. Car. 256; *ante*, p. 44, as to holding one out as owner. But that could not be true in a contest between those creditors and the creditors of the one who paid for the property. See *Mullanphy Bank v. Lyle*, 7 Lea, 431; chapter 16, at end.

³ *Shorten v. Woodrow*, 34 Ohio St. 645, 655; *Gowing v. Rich*, 1 Ired. 553,

559. One result of this is that a sale on execution at law would pass no title. *Haggerty v. Nixon*, 26 N. J. Eq. 42; *Garfield v. Hatmaker*, 15 N. Y. 475; *Doe d. Davis v. McKinney*, 5 Ala. 719.

If the consideration is not paid by the husband of the grantee, the property of course cannot be taken for the husband's debts, though the purpose of the transaction was to put it beyond the reach of his creditors. *McLean v. Hess*, 106 Ind. 555. For property may be settled upon a married woman, by a stranger, not subject to the debts of her husband.

not within the language of 'transfers, conveyances, or assignments,'¹ this has more recently been treated as an erroneous view,² and as opposed to a previous case³ in the same court, in which however the point was not considered. And it was pointed out that since the decision criticised the legislature had regarded the decision unfavorably and had put an end to it.⁴ According then to the later doctrine of the Ohio courts, the language of the statute, as it had previously stood, covered the case of property purchased and paid for by A, who procures the title to be made to B. And this rule is sustained by decisions of the courts of Massachusetts (by statute), of New York before the Revised Statutes changed the law, of Pennsylvania, of Indiana, of Texas, and of Iowa, if not of other states.⁵

¹ *Shorten v. Woodrow*, 34 Ohio St. 645.

² *Bloomington v. Stein*, 42 Ohio St. 168, 172.

³ *Combs v. Watson*, 32 Ohio St. 228.

⁴ *Bloomington v. Stein*, *supra*.

⁵ *Peterson v. Farnum*, 121 Mass. 476; *Cone v. Hamilton*, 102 Mass. 56; *Wait v. Day*, 4 Denio, 439, 442; *Guthrie v. Gardner*, 19 Wend. 414; *Kimmel v. McRight*, 2 Barr, 38; *Trip-lett v. Graham*, 58 Iowa, 135; *Boulton v. Hahn*, *ib.* 518; *Gear v. Schrei*, 57 Iowa, 666; *Tavis v. Doe*, 3 Ind. 129; *Pennington v. Clifton*, 11 Ind. 162, 164; *Hawkins v. Cramer*, 63 Texas, 99. Contra in Massachusetts prior to 1844. *Hamilton v. Cone*, 99 Mass. 478; *Cone v. Hamilton*, *supra*. See also *Peck-ebaugh v. Cook*, 61 Iowa, 477; *Goodwin v. Hubbard*, 15 Mass. 210; *Cecil Bank v. Snively*, 23 Md. 253; *Pritchard v. Brown*, 4 N. H. 397; *Eve v. Louis*, 91 Ind. 457.

The case of *Wait v. Day*, in which Bronson, C. J., one of the ablest of all the judges of New York, delivered the

opinion, is noteworthy, for it speaks of the law of New York before the special Statute of Uses and Trusts, under which the cases of the text are in that state now held to fall. 'Under the old law of uses and trusts,' says the court, 'where lands were conveyed to one person, and the consideration was paid by another, there was a resulting trust in favor of him who paid the money; and the statute of 29 Car. 2, c. 3, § 10, which was re-enacted in this state, subjected the lands to judgments and executions against the cestui que trust in the same manner as though he had been seised of the legal estate. 1 R. L. 74 § 4. Under the present statute no use or trust results in favor of him who paid the money and the title vests in the person named as alienee in the deed. But the conveyance is presumed fraudulent as against the creditors, at that time, of the person paying the consideration; and if a fraudulent intent is not disproved, a trust results in favor of those creditors, to the extent which may be necessary to satisfy their just demands. 1 R. S. 728, §§ 51, 52. The

Now it is not without force to say that to allow the creditor to take the property in question (by execution) as the property of his debtor is only to allow him to take the proceeds of his debtor's property, in the hands of a volunteer. The creditor is but following his debtor's property; and this he may do under the statute of Elizabeth in the ordinary case of a transfer by the debtor's volunteer-grantee to another volunteer.¹ The creditor cannot get the money which the debtor paid;² and he may well take, under the statute, what stands in its place. In substance the case does not differ from a case in which the debtor should give a chattel to A, by whom it has been passed on to B as a volunteer; he has only given money, and then that money, in the form of the chattel, has been passed on. If that is not an 'alienation' by the debtor, it would be difficult to say what would constitute an alienation by him. It is apprehended that our statutes,

Chancellor has said that the creditors cannot sell an execution. *Brewster v. Power*, 10 Paige, 562. But the case did not call for a decision of the question; and I think the 45th section of the Statute of Uses and Trusts must have been overlooked.' *Ac. Guthrie v. Gardner*, 19 Wend. 414; *Tevis v. Doe*, 3 Ind. 129, 131.

Upon this last point the case has been overruled, and the view of Chancellor Walworth in *Brewster v. Power* affirmed. *Garfield v. Hatmaker*, 15 N. Y. 475, 477. But the statement of Brónson, C. J. in regard to the law before the Revised Statutes is not only not disputed, it is re-affirmed. *Comstock, J.* at p. 477. The Revised Statutes had *changed* the law. So *Brown, J.* at pp. 482, 483. See also *Gowing v. Rich*, 1 Ired. 553, 559, 560. The statute of 29 Car. 2, ut supra, it need hardly be said, is the Statute of Frauds. See vol. 1, pp. 451 et seq. The result is that the statutes against fraudulent

conveyances, with the aid of legislation in force where it has not been changed, meet the present case. See further *Doe d. Davis v. McKinney*, 5 Ala. 719, 728; *Hamilton v. Cone*, 99 Mass. 478; *Ocean Bank v. Olcott*, 46 N. Y. 22; *Moore v. Page*, 111 U. S. 117.

¹ Post, chapter 16, near the end. In *Gowing v. Rich*, 1 Ired. 553, 559, it is said that the creditor's remedy is a 'right in equity to follow the funds of the debtor. *Dobson v. Erwin*, 1 Dev. & B. 569.' But the statute gives the same sort of remedy; indeed the very object of the statute was to give a plain remedy at law where before there was one only in equity.

² Nor could he get any property which his debtor may have exchanged, unless the party to whom it was transferred was privy to the fraud; if such party *was* privy to the fraud, of course property transferred to him could be taken on execution.

where not affected by special legislation, were intended to afford a broad, immediate, and effective remedy to the defrauded creditor, a remedy over all technical obstacles of the law. Indeed they directly transmute equitable into legal rights,¹ and so may well cover this case; and that, accordingly, without the aid of other legislation.² It is clearly so of personalty;³ and it is unjust to put the creditor to the expense of a suit in equity to take land.

But the courts which refuse to apply this liberal construction to the statutes do not suffer the volunteer to hold the property; they declare that the creditor can reach it in equity, not perhaps on the ground of any equitable construction of the statute, but because of the inherent jurisdiction of equity over fraudulent transactions.⁴ In New

¹ There can be no doubt that before the English legislation, which we have adopted, creditors could in equity reach property which the statute allows them to take on execution; and no execution could have reached property the legal title to which had been transferred. See *Dyer*, 294 b, a case just before, with final proceedings after, the statute of 13th Elizabeth.

² But see *Gowing v. Rich*, *supra*, at pp. 559, 560.

³ *Godding v. Brackett*, 34 Maine, 27.

⁴ *Gowing v. Rich*, 1 Ired. 553, 559; *Gentry v. Harper*, 2 Jones, Eq. 177; *Den d. Jimmerson v. Duncan*, 3 Jones, 537; *Cone v. Hamilton*, 102 Mass. 56; *Gray v. Faris*, 7 Yerg. 155; *Webster v. Folsom*, 58 Maine, 230; *Low v. Marco*, 58 Maine, 45; *Corey v. Greene*, 51 Maine, 114; *Dockray v. Mason*, 48 Maine, 178; *Howe v. Bishop*, 3 Met. 28; *Russell v. Lewis*, 2 Pick. 508; *Whittlesey v. McMahon*, 10 Conn. 137; *Botsford v. Beers*, 11 Conn. 369, 374; *Brewster v. Power*, 10 Paige, 559; *Garfield v. Hatmaker*, 15 N. Y. 475

(overruling *Wait v. Day*, 4 Denio, 439); *Ocean Bank v. Olcott*, 46 N. Y. 22; *Taylor v. Heriot*, 4 Desaus. Eq. 227, 234; *Haggerty v. Nixon*, 26 N. J. Eq. 42; *Mulford v. Peterson*, 35 N. J. 127, 138; *Dewey v. Long*, 25 Vt. 564; *Doyle v. Sleeper*, 1 Dana, 533; *Adams v. O'Rear*, 80 Ky. 129; *Hockett v. Bailey*, 86 Ill. 174 (whether this equity case was under the statute does not appear); *Simmons v. Ingram*, 60 Miss. 886; *Bernheim v. Beer*, 56 Miss. 149; *Winters v. Claitor*, 54 Miss. 341; *Carlisle v. Tindall*, 49 Miss. 229; *Alston v. Rowles*, 13 Fla. 117, 125; *Cutter v. Griswold*, Walk. Ch. (Mich.) 437; *Miller v. Wilson*, 15 Ohio, 108; *Bloomingtondale v. Stein*, 42 Ohio St. 168, 172. See *Doe d. Davis v. McKinney*, 5 Ala. 719; *Conover v. Ruckman*, 36 N. J. Eq. 493; *Hitchcock v. Kiely*, 41 Conn. 611; *Brown v. Howser*, 61 Ga. 629; *Bennett v. Hutson*, 33 Ark. 762.

The following case arose before Lord Hardwicke: The defendant had entered into articles with his uncle for the purchase of an estate in fee. Soon afterwards the plaintiff proposed to the de-

York, and in not a few other States following the example of New York, special legislation has provided for such cases, by impressing a trust upon the property in favor of creditors;¹ which however does not imply any belief that the general statute against fraudulent conveyances (with the aid of the English Statute of Frauds and its counterparts here) did not cover the case.² A wife to whom land has thus been conveyed is not entitled to dower against the husband's creditors.³

It remains to present a series of examples of the operation of the statutes, by way of illustrating their application to the various devices of debtors having the effect and yet not the form of alienation. Among the acts not in the form of alienation which yet amount to alienation, and bring the case within the operation of the statute, the surrender of a debt may be mentioned. Thus a trader who cancels a debt upon his books alienates his property for the purposes of the statute. Perhaps this would not be the case if the debt could be shown to be absolutely worthless, or invalid, or barred by limitation, or for any other reason not enforceable; for then nothing would have been parted with, and

fendant to purchase the estate for him; and an agreement to that effect was made by the parties. But now the uncle surrenders the estate, to which the nephew alone was entitled, to the nephew and wife and the heirs of their bodies, remainder to the nephew in fee. The plaintiff filed a bill for specific performance, relying upon the statute of 27th Elizabeth, c. 4, against the claims of the wife and entail; and the bill was sustained. 'In this court,' said his lordship, 'if a person entitled to an estate to himself and his heirs takes a conveyance of the estate so as to put a right in another, the court will consider it fraudulent.' *Underwood v. Hitchcox*, 1 Ves. 279. See also *Neate v.*

Marlborough, 8 Mylne & C. 407; *Goldsmith v. Russell*, 5 De G. M. & G. 547.

¹ N. Y. Stat. of Uses and Trusts, 1 R. S. 728, § 52. See *Wood v. Robinson*, 22 N. Y. 564; *Dunlap v. Hawkins*, 59 N. Y. 342; *Niver v. Crane*, 98 N. Y. 40; *Leonard v. Green*, 30 Minn. 496; s. c. 34 Minn. 137; *Molm v. Barton*, 27 Minn. 530; *Rogers v. McCauley*, 22 Minn. 384; *Fairbairn v. Middlemiss*, 47 Mich. 872; *Eve v. Louis*, 91 Ind. 457, 466; *Wilds v. Bogan*, 55 Ind. 331.

² See *Wait v. Day*, 4 Denio, 439, 442; *Garfield v. Hatmaker*, 15 N. Y. 475, 477; *supra*, pp. 124, 125, note.

³ *Simmons v. Ingram*, 60 Miss. 886.

the creditor would have nothing to gain by impeaching the transaction. But with regard to debts alleged to be worthless it would be dangerous, as we have elsewhere seen, to allow evidence of the fact in the case of an actual alienation, as in the case of a voluntary conveyance of property heavily incumbered, incumbered, as alleged, for more than its value;¹ and so, if the cancellation of a debt is otherwise obnoxious to the statute, the courts would, it is conceived, ordinarily refuse to hear evidence that the debt was of no value, assuming that it is enforceable. There is no distinction in principle between the two cases; cancelling the debt of an insolvent person would not stand upon the footing of the gift of trifling things.²

¹ Ante, pp. 47, 48.

² As to such things, see ante, p. 47, note. In regard to cancelling 'worthless' debts, a New York case may be noticed. *Hoyt v. Godfrey*, 88 N. Y. 669. In that case a debtor had cancelled a debt due from his brother, amounting nearly to \$6000, on the ground that the demand was worthless, and this was allowed by the court. But the case did not arise under the statute against fraudulent conveyances; it was a question of vacating an order of arrest of the debtor for the act,—that is to say, it was a criminal case. Further, there was evidence that the debtor had acted honestly in the transaction, without any intent in point of fact to defraud; and that was a defence to *criminal* proceedings. Ante, p. 8, note. If the case was intended to go further than this, it may well be doubted. The language of the court was this: 'Does it follow that such act amounts to a disposition of his property with intent to defraud his creditors? To constitute such a disposition of property, three things must concur: first, the thing disposed of must be of value, out of which

the creditor could have realized all or a portion of his claim; second, it must be transferred or disposed of by the debtor; and third, this must be done with intent to defraud. . . . Does such an entry in the books of account amount to a transfer or disposition of the debt? We think not. If made without consideration, it does not amount to a satisfaction of the debt.' The last observation clearly is aside from the purpose; would not the act, though without consideration, be a transfer or disposition if the property was of value? It would certainly be an 'alienation' under the statute of Elizabeth.

The court, however, refers to another decision on the point of value of the debt, which concerned the statute against fraudulent conveyances. *Shultz v. Hoagland*, 85 N. Y. 464. That was a case of the omission of certain funds in the schedules of an assignment, partly by accident and oversight and so far corrected afterwards; the rest being 'worthless' or in dispute. The case has been commented upon on another page. Ante, p. 49.

Again an alienation may be effected by adding to the principal sum due upon a promissory note or other security, or by making the rate of interest greater than is due. But possibly a debtor may add interest to a demand, where the allowance of interest is just, though payment of it could not be enforced by law.¹ Such a case however, if ever proper, would be one to be narrowly scrutinized, and the rate or the sum allowed, if anything is justly allowable, should not exceed what a reasonable regard for the circumstances would dictate. On the other hand a debtor, though insolvent, may emancipate his children so as to entitle them, against his creditors, to their earnings.² A debtor may also give the benefit of his time and labor, without pecuniary reward, to another, as e. g. to his wife, in the improvement or creation of a valuable property; that is a matter personal to the debtor.³ And a debtor though insolvent may use his earnings to pay for insurance on his life, in favor of his family.⁴

Another case in which an act amounts to an alienation

¹ See *Spencer v. Ayrault*, 10 N. Y. 202; *Pennington v. Woodall*, 17 Ala. 685. See however *Watson v. Cummings*, 40 N. J. Eq. 483; *Lyne v. Wann*, 72 Ala. 43; *Gordon v. Tweedy*, 71 Ala. 202. In *Gordon v. Tweedy* the court says: 'Neither can interest be estimated as a lawful or valuable consideration. The husband is not accountable, under the statute, for the rents and incomes of the wife's statutory separate estate, which includes interest on her moneys used or converted by him. It was held by this court, *Earl v. Owens*, 68 Ala. 171, that a conveyance made by a husband to secure to the wife such rents or incomes, which he had converted to his own use, was voluntary and void as to existing creditors, thus overruling the contrary principle decided in *Brevard v. Jones*, 50 Ala. 241. Nor can interest be allowed the wife for the use or

conversion by the husband of her equitable separate estate, in the absence of an agreement to pay such interest, or of an express dissent on the wife's part objecting to the husband's reception of the same. *Roper v. Roper*, 29 Ala. 247; *Newton v. McAfee*, 64 Ala. 357.' Further see *Goff v. Rogers*, 71 Ind. 459.

² *Atwood v. Holcomb*, 39 Conn. 270; *Clemens v. Brillhart*, 17 Neb. 335.

³ *Abbey v. Deyo*, 44 N. Y. 343; *Eilers v. Conradt*, 39 Minn. 242; *Johnson v. Silsbee*, 49 N. H. 543.

⁴ *Central Bank v. Hume*, 128 U. S. 195. If however he obtained the insurance for his *estate*, he could not, when insolvent, transfer the policy to another except for value. *Ib.*; *Elliott's Appeal*, 50 Penn. St. 75; *McCutcheon's Appeal*, 99 Penn. St. 133; *Freeman v. Pope*, L. R. 5 Ch. 538.

is where a debtor in order to induce a certain creditor of his to consent to a composition deed turns over to that creditor, without the knowledge of the other creditors, a particular security, or his own personal note or obligation. In some of the authorities the act of the debtor in such a case is treated as done under compulsion or exaction, so that he cannot be regarded as 'in pari delicto' with the favored creditor;¹ but even if that be sound, which is doubtful,² it would have no bearing upon a question of the rights of other creditors to object to the transaction as a fraudulent alienation.

Sales, interchanges, and adjustments of partnership property between partners are clearly alienations within the statute;³ but alienations between partners stand upon a special footing where the question is of the respective rights of individual and partnership creditors. The latter take precedence of the former in a distribution of the partnership assets; and in a case in which the assets are insufficient to satisfy all the partnership creditors the individual creditors cannot object to inter-alienations between the partners themselves. More than that, it seems that where there has been no division of the partnership property according to the proportions of the several partners, so that a creditor of one of the partners might, while things stood thus, seize the property as apparently the separate property of his debtor, — in such a case it seems that the partners can divide the partnership property according to their proportions, to prevent the creditor from taking it, or from taking any part of

¹ *Smith v. Bromley*, 2 Doug. 696; *Kingston Ins. Co.* 5 N. Y. 405; *Powers v. Guardian Ins. Co.* 136 Mass. 108; *Smith v. Cuff*, 6 Maule & S. 160; *Atkinson v. Danby*, 7 Hurl. & N. 934.

² *Solinger v. Earle*, 82 N. Y. 393.

³ *Ex parte Mayou*, 4 De G. J. & S. 664, Lord Westbury, sale by one partner of his interest to his copartner, both being insolvent. Comp. and distinguish insurance cases. *Tillou v.*

Hobbs v. Memphis Ins. Co. 1 Sneed, 444. If however one partner has lawfully purchased the interest of his copartners, he may use the late partnership property in paying his individual debts; the partnership creditors cannot object. *Fulton v. Hughes*, 63 Miss. 61.

it against the rights of firm creditors.¹ The act would be an alienation, but not an alienation with intent to defraud.

Again, a debtor will sometimes attempt a voluntary alienation of his property under the shelter of a lawful conveyance for value. A subtle instance of the kind is seen in a case² in the English Court of Chancery, in which there had been a sale of property by an insolvent trader. In consideration of a money payment to the trader, and that the purchaser should, during the joint lives of the trader and his wife, pay the former an annuity equal to a fourth of the profits of his business and a contingent annuity to the *wife* in case she survived her husband equal to a sixth of the profits, the trader sold his business and stock in trade. The trader died in the lifetime of his wife, and a creditors' bill was now filed to administer his assets, including as part thereof the contingent annuity to the widow, as a mere voluntary provision; and the court agreed to that view.³ There was indeed a valuable consideration for the sale, but then the entire benefit of it belonged to, and in the interests of creditors should be received by, the debtor.

Still another way in which there may be an alienation of a debtor's property is where the property has been put by the debtor into the hands of another, whether as a deposit, or a loan, or without any definite understanding in regard to the use or the return of it, or where some one has so taken it with the assent of the debtor. A common case is the handing over of money or property belonging to a wife, to her husband, under some definite or under no definite arrangement in regard to the use of it, but with no agreement for returning it. Cases of this sort have more commonly been made a ground of claim on the part of creditors of the

¹ *Atkins v. Saxton*, 77 N. Y. 195.

² *French v. French*, 6 De G. M. & G. 95.

28 L. J. Ch. 45, which puts the case on the ground of benefit reserved to a grantor, an equally good ground.

³ To the same effect, *Neale v. Day*,

husband,¹ which so far of course would not be a matter of the statute of Elizabeth;² but they may as well make a claim for the wife's creditors, under the statute.³

Thus far of *acts* on the part of the debtor. It is equally clear that there may be alienations by the debtor by mere omission. Thus the debtor may *suffer* judgment to go against him; it is not necessary for the purposes of the statute that he should appear and give or confess judgment,⁴ or that he should give a warrant for confessing judgment. So a debtor may, in order to circumvent his creditors, allow his friends to make off with his property, to cut down and use up his timber, or to occupy and use his lands or goods without reward. Such omissions, in the case of an insolvent person, would, it seems, be obnoxious to the statutes against fraudulent conveyances. While the debtor's property can be traced, until it reaches the hands of a purchaser for value without notice, or until a lien is acquired upon it without

¹ *Humes v. Scruggs*, 94 U. S. 22; *Hanson v. Manley*, 72 Iowa, 48; chapter 18, § 7.

² A subsequent voluntary conveyance of the fund back to the wife would however make a case for the statute. 'If the money which a married woman might have had secured to her own use is allowed to go into the business of her husband, and be mixed up with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in his business, and is thus used for a series of years, there being no specific agreement when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts. He cannot retain until bankruptcy occurs, and then convey it to his wife. Such conveyance is in fraud of the just claims of the creditors of the husband. *Fox v. Moyer*, 54

N. Y. 125, 131; *Savage v. Murphy*, 34 N. Y. 508; *Babcock v. Eckler*, 24 N. Y. 623; *Robinson v. Stewart*, 10 N. Y. 190; *Carpenter v. Roe*, ib. 227; *Hinde v. Longworth*, 11 Wheat. 199.' The court in *Humes v. Scruggs*, *supra*. So in *Hanson v. Manley*, *supra*. For special illustrations see *ante*, pp. 44, 45, note; also *Weil v. Raymond*, 142 Mass. 206. As to the kindred subject of confusion of goods, see *Smith v. Sanbern*, 6 Gray, 134; vol. 1, pp. 575, 576.

³ What would be done in a contest between the wife's and the husband's creditors in such a case? Could the wife's property be separated from the husband's? But the husband's creditors have been misled into supposing that it all belonged to the husband; and the wife's creditors could not be better off under the statute than the wife. It would seem that the husband's creditors must prevail.

⁴ *Ante*, p. 120, note.

notice, it may be taken by creditors as having been aliened by their debtor.

In the way of omission, it does not constitute an alienation within the statutes for the debtor to forego certain advantages which are entirely personal to himself, such as the publication of a manuscript.¹ Nor would it be an alienation for the debtor, when sued, to forego a defence of the Statute of Limitations, or (according to some authorities) of the Statute of Frauds, or of usury, or of other matters of the kind, possibly, where in natural justice the demand should be paid² or the particular thing done.³ So too a debtor may, as we have seen emancipate his minor children so as to give to them, against his own creditors, the right to their earnings;⁴ but that is on the footing of the act of emancipation, without which creditors could probably (by garnishment) take them.⁵

There is however reason to doubt the correctness of this in cases in which, as in those touching the Statute of Frauds or infancy, the contract in question was never enforceable; and there is very high authority for the proposition that in such cases the alienation cannot be connected with the prior contract. Hence a transfer of property in discharge of or security for the invalid contract would or might be in fraud of creditors on the footing of an ordinary voluntary convey-

¹ *Dart v. Woodhouse*, 40 Mich. 399; (same); *Chapin v. Thompson*, 89 N. Y. ante, p. 50. 271 (usury). But see *Luers v. Brunjes*,

² Ante, p. 50; also *Cahill v. Bigelow*, 18 Pick. 369 (Statute of Frauds); *Cresswell v. McCraig*, 11 Neb. 227 (same); *French v. Motley*, 63 Maine, 326 (Statute of Limitations); *Brigham v. Fawcett*, 43 Mich. 542 (same); *City Bank v. Wright*, 68 Iowa, 182 (same); *Brookville Bank v. Kimble*, 76 Ind. 195 (same); *Kennedy v. Powell*, 34 Kans. 22 (same, between husband and wife); *Hubbard v. Allen*, 59 Ala. 283 (same); *Keen v. Kleckner*, 42 Penn. St. 529

34 N. J. Eq. 19 and 561; *Low v. Workman*, 44 N. J. Eq. 193, 201. Both of these cases are on the Statute of Limitations, long run out.

³ See *Cottrel v. Smith*, 63 Iowa, 181; chapter 6, § 9.

⁴ *Atwood v. Holcomb*, 39 Conn. 270; *Clemens v. Brillhart*, 17 Neb. 335.

⁵ As to emancipation see *McCloskey v. Cyphert*, 27 Penn. St. 220; *Dierker v. Hess*, 54 Mo. 246.

ance, for if the alienation cannot be connected with the prior contract, there is no consideration for the alienation.¹ The contrary rule makes easy a case suggested by Lord Northington: On the eve of his son's marriage a man makes a verbal promise, in consideration of the marriage, to settle property; the promise cannot be enforced, and the promisor does not fulfil it at first; finally however he becomes involved, and now conveys his property in execution of the promise. This might well be deemed a 'most dangerous breach of the statute and a violent blow to credit.'²

There is ground for distinguishing cases arising under the Statute of Limitations and other cases, where there has been for a time a valid obligation; such cases cannot easily be made a cover for fraud. A claim barred by limitation may be revived by a subsequent promise to pay or by part payment;

¹ *Warden v. Jones*, 2 De G. & J. 76; *Trowell v. Shenton*, 8 Ch. D. 318, C. A. (infancy); *Spurgeon v. Collier*, 1 Eden, 91; *Randall v. Morgan*, 12 Ves. 67; *Lloyd v. Fulton*, 91 U. S. 479; *Borst v. Corey*, 16 Barb. 136; *Deshon v. Wood*, 148 Mass. 132. Contra, *Dundas v. Dutens*, 2 Cox, 235; s. c. 1 Ves. Jr. 196; *Hussey v. Castle*, 41 Cal. 239. The only question then would be on the validity of the conveyance as a gift.

According to this it can make no difference that the oral antenuptial agreement is referred to expressly in the subsequent conveyance, for the agreement is still oral. In *Warden v. Jones*, supra, Lord Cranworth, at p. 85, says: 'Lord Thurlow decided in *Dundas v. Dutens*, 2 Cox, 235; s. c. 1 Ves. Jr. 196, that such a settlement is good, and on that decision I will only remark that if it be a correct view of the law, the whole policy of the statute is defeated. It cannot be enough merely to say in writing that there was a previous parol agreement. It must be proved that there was such an agreement, and to

let in such proof is precisely what the statute meant to forbid.' This passage is quoted with strong approval by Jessel, M. R. in *Trowell v. Shenton*, supra, a case under 27 Eliz. c. 4. 'In that short passage,' it was observed, 'the Lord Chancellor disposed of all the other authorities.' And the learned Master of the Rolls added, 'We were pressed with an old case of *Lavender v. Blackstone*, 2 Lev. 146, in which Lord Hale made a remark to the effect that a settlement was not fraudulent under the statute 27 Eliz. c. 4, if made in pursuance of articles entered into during the infancy of the settler. The answer is, that dictum is not law.'

Marriage is not part performance, so as to take the oral contract out of the statute. *Warden v. Jones*, supra; *Caton v. Caton*, L. R. 1 Ch. 137, 147 (s. c. L. R. 2 H. L. 127). But see *Hussey v. Castle*, supra.

² Lord Northington in *Spurgeon v. Collier*, 1 Eden, 61; Lord Cranworth in *Warden v. Jones*, 2 De G. & J. 76, 84.

and as the claim may be made binding by a promise to pay, there need be no interval between promise and performance; payment without a previous promise will therefore be good against other creditors. The bar of the statute is necessarily personal. But it has never been supposed that a subsequent promise to pay or part payment, or any other act of the kind, would validate a claim within the Statute of Frauds. Satisfaction of a claim under that statute may well be one of the alienations within the meaning of the statutes against fraudulent conveyances. It follows too that if the debtor, when sued upon the claim, fails to plead the Statute of Frauds, the judgment will be a fraud upon other creditors.¹

¹ The strongest authority against the text is *Cahill v. Bigelow*, 18 Pick. 369 (not noticed in *Deshon v. Wood*, 148 Mass. 132, *supra*). That was the case of a trustee (garnishee) of the defrauding debtor, to whom the trustee was indebted under a parol contract of guaranty. 'The court are of opinion,' said Chief Justice Shaw, 'that the guarantor by parol was not bound, against his own choice, to set up the Statute of Frauds, to avoid his promise to pay for the supplies furnished to Mrs. Bigelow. The contract entered into by him with these persons was a lawful one, made on sufficient consideration, and would be good at common law. But the statute, on considerations of policy, intervenes

and declares, that such a contract shall not be enforced by action unless the agreement or some memorandum thereof shall be in writing. But the statute is intended as a shield, and is to be used for the protection of those who would be in danger of suffering injury from false testimony by setting up pretended parol promises of guaranty. . . . The trustee in effect declares his election not to avail himself of the Statute of Frauds to avoid his parol undertaking to pay these debts, but to pay them according to the original understanding between him and the other parties; and the court are of opinion that he has a right to do so and to charge the payments in his account with Mrs. Bigelow.'

CHAPTER VI.

'CREDITORS AND OTHERS.'¹

§ 1. QUESTION TO BE CONSIDERED.

WE have now ascertained the different modes and devices by which a debtor may manifest an intent to hinder, delay, or defraud his creditors. The next inquiry is concerning the persons to be affected; who are 'creditors,' or rather 'creditors and others,' within the meaning of the statute? The question has been referred to several times already as incident to the consideration of other questions; it now arises as the primary question and calls for more general examination.

The general answer to the question proposed is, (1) that no one as a mere creditor falls within the meaning of the statute; the statute of Elizabeth gives no creditor as such the right to interfere with the dispositions of his debtor's property, though fraudulent;² (2) that the statute does not mean simply credi-

¹ See chapter 18.

² *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Angell v. Draper*, 1 Vern. 399; *Shirley v. Watts*, 3 Atk. 200; *McElwain v. Willis*, 9 Wend. 548; *Reubens v. Joel*, 13 N. Y. 488; *Adee v. Bigler*, 81 N. Y. 349; *McMinn v. Whelan*, 27 Cal. 300; *Goode v. Garrity*, 75 Iowa, 713; *Fleming v. Grafton*, 54 Miss. 79 (reviewing the authorities); *Wadsworth v. Schissebauer*, 32 Minn. 84 (also reviewing authorities); *Tennent v. Battey*, 18 Kans. 324; *Buchanan v. Marsh*, 17 Iowa, 494, 596; *Phelps v. Jackson*, 27 Ark. 585; *Cox v. Fraley*, 26 Ark. 20; *Meux v. Anthony*, 6 Eng. (Ark.) 411;

Uhl v. Dillon, 10 Md. 500; *Mathews v. Mobile Ins. Co.* 75 Ala. 85; *McCoy v. Watson*, 51 Ala. 466; *Lehman v. Meyer*, 67 Ala. 396; *Goembel v. Arnett*, 100 Ill. 34. The rule is changed by statute in some states, *Bromberg v. Heyer*, 69 Ala. 22, that a simple contract creditor may file a bill to set aside a fraudulent conveyance of his debtor; *Battle v. Ried*, 68 Ala. 149; *Lehman v. Meyer*, supra; *Jones v. Massey*, 79 Ala. 370; *Phelps v. Smith*, 116 Ind. 387, 399; *Field v. Holzman*, 93 Ind. 205, 209; *Cocks v. Varney*, 45 N. J. Eq. 72.

Chancellor Kent, in *Wiggins v. Armstrong*, supra: 'Until the creditor has

tors in the technical sense of persons who have demands arising by contract express or implied; the use of the words

established his title, he has no right to interfere. . . . Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds.' See the cases on injunction, *infra*, p. 141. *Blish v. Collins*, 68 Mich. 542, 548. Nor will it make any difference that the debtor is insolvent. *Adee v. Bigler*, *supra*; *Estes v. Wilcox*, 67 N. Y. 264.

In New York and in some other states equity will not interfere, unless a lien has been acquired, until after execution has been issued and returned unsatisfied. *Adee v. Bigler* and *McElwain v. Willis*, *supra*; *Adsit v. Butler*, 87 N. Y. 585; *Southard v. Benner*, 72 N. Y. 424; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Beardsley Scythe Co. v. Foster*, 36 N. Y. 565; *Ocean Bank v. Olcott*, 46 N. Y. 12; *Ahlkauer v. Dowd*, 74 Wis. 400, 406 (admitting equity jurisdiction where a lien has been acquired). For until then it does not appear that the creditor has not the ordinary legal remedy. Perhaps this is true also in Massachusetts. So the rule is stated in *Powers v. Raymond*, 137 Mass. 483, 484, Field, J. citing *Ayer v. Murray*, 105 U. S. 126, and *Carver v. Peck*, 131 Mass. 291. But those cases do not go so far. See also *Trow v. Lovett*, 122 Mass. 571; *Wiggins v. Haywood*, 118 Mass. 514; *Jones v. Green*, 1 Wall. 330. Other authorities, English and American, require only the issuance of execution as a condition to jurisdiction in equity, on the ground that a lien is then acquired, which is sufficient for the purpose of such jurisdiction. *Angell v. Draper*, 1 Vern. 399; *Edgell v. Haywood*, 3 Atk. 352, 357; *Neate v. Marlborough*, 3 Mylne & C. 407; *Fleming v. Grafton*, 54 Miss. 79 (a valu-

able case); *Moran v. Dawes*, Hopk. Ch. 365; *Adler v. Fenton*, 24 How. 407, 411; *Jones v. Green*, 1 Wall. 330, 332; *Webster v. Clark*, 25 Maine, 313; *Shufeldt v. Boehm*, 96 Ill. 560, 563; *Miller v. Davidson*, 3 Gilman, 518; *Buchanan v. Marsh*, 17 Iowa, 494; *Miller v. Dayton*, 47 Iowa, 312; *Witman's Appeal*, 45 Penn. St. 455, 463. Secus of a lien created in the ordinary way, without judgment; the lien creditor is already protected. *McMinn v. Whelan*, 27 Cal. 300; *Witman's Appeal*, *supra*; *Stephens v. Oliver*, 2 Bro. C. C. 90, 92; *Freeman v. Pope*, L. R. 5 Ch. 538, 541, 542; *May*, *Fraudulent Conveyances*, 163, 2nd ed.; *post*, pp. 415, 485. The *absence* of a lien at the time of the conveyance was urged against the claim of creditors in *Bennett v. Stout*, 98 Ill. 47, but of course without effect. *Newman v. Willetts*, 52 Ill. 98, was explained.

In many states a judgment itself is made by statute a lien upon lands, which would be sufficient to give to the creditor the right to resort to equity for setting aside the previous conveyance. *Wadsworth v. Schissebauer*, 32 Minn. 84. But a domestic judgment would be necessary of course. *Crim v. Walker*, 79 Mo. 335. See further *ante*, p. 80, note. Filing a bill in equity to set aside a fraudulent conveyance does not of itself in Massachusetts, if anywhere, create a lien upon the property. *Powers v. Raymond*, 137 Mass. 483; *Squire v. Lincoln*, *ib.* 399; *Trow v. Lovett*, 122 Mass. 571. Generally speaking the claim must have matured and become fixed, at least in part. *Robinson v. Rogers*, 84 Ind. 539; *ante*, p. 43, note 1. But the creditor remains such until his claim is satisfied; a void

‘and others’ following ‘creditors’ in the statute shows this, and the fact has often been emphasized by the courts. The statute has received a liberal construction, and the expression declared to mean all persons having claims enforceable by process of law in any court of justice;¹ and in a few exceptional cases the meaning has been further extended.²

In ordinary cases touching fraudulent conveyances there can be no question whether a person falls within the designation of ‘creditors and others,’ for in such cases the person who claims the benefit of the statute has already obtained a judgment; one is then a creditor in the legal sense whatever may have been the nature of the demand;³ — unless the judgment itself was in fraud of creditors. Nor does it make any difference what sort of judgment has been obtained, whether it be upon verdict of a jury or by a simple order of court to pay over money; in any case the party is a creditor. The nature of the demand therefore is irrelevant; so is any suggestion that the demand might have been successfully resisted, whether on the case then before the court or upon newly-discovered facts; so also is any suggestion that the judgment pronounced is erroneous, if it is not absolutely void. The judgment, while it stands unimpaired, is towards all persons conclusive in collateral proceedings, if it is not in fraud of creditors or otherwise void, of the status of the

execution and sale will not discharge the claim, though the judgment is satisfied of record. See § 17.

¹ *Anderson v. Anderson*, 64 Ala. 403. Whether the conveyance was made before or after the claim became a right of action is immaterial. *Ib.* Brickett, C. J. : ‘The bill discloses that Anderson became administrator before the execution of the conveyance asserted as voluntary. It is not important whether the devastavit ascertained by the decrees against him on the final settlement of his administration was com-

mitted prior or subsequently to the conveyance.’ See post, § 3. Still in those states which discriminate against future creditors there must be a basis for the claim, at the time of the conveyance. *Donley v. McKiernan*, 62 Ala. 34.

² Post, § 9.

³ So too where an award of arbitrators is made, *Swan v. Smith*, 57 Miss. 548, that when partnership accounts are submitted to arbitration, the award that certain partnership debts shall be paid by one of the partners makes the others his creditors from the time of the award.

person in whose favor it runs;¹ that person is a creditor, and a creditor from the time of the original demand. Nor

¹ *Candee v. Lord*, 2 Comst. 269; *Raymond v. Richmond*, 78 N. Y. 351; *Acker v. Leland*, 109 N. Y. 5, 16; *Voorhees v. Seymour*, 29 Barb. 569, 585; *Brigham v. Fayerweather*, 140 Mass. 411, 413; *Way v. Lewis*, 115 Mass. 26 (a case of principal and surety, which perhaps stands on grounds of its own); *Cutter v. Evans*, *ib.* 27 (same); *Sheetz v. Hanbest*, 81 Penn. St. 100; *Wingate v. Haywood*, 40 N. H. 437; *Swihart v. Spaner*, 24 Ohio St. 432; *Cincinnati v. Diekmeier*, 81 Ohio St. 242; *Sidensparker v. Sidensparker*, 52 Maine, 481; *Bigelow, Estoppel*, 150, 151, 5th ed. Further see *Old Folk's Soc. v. Millard*, 86 Tenn. 657; *Van Wyck v. Seward*, 18 Wend. 375, 379, 380; *Decker v. Decker*, 108 N. Y. 128. This is what is meant when it is said that creditors can only impeach a judgment for collusion. *Collins v. Cronin*, 117 Penn. St. 35.

The cases of *Inman v. Mead*, 97 Mass. 310 and *Hartman v. Weiland*, 36 Minn. 223, *contra*, are certainly wrong. In the first case A was allowed to show that a judgment in favor of the plaintiff in a suit by B against C, was not conclusive that B was creditor of C; and that without attacking the judgment as fraudulent or otherwise void. In *Hartmann v. Weiland* it was held that the judgment was not even evidence of the debt. But in the absence of fraud or want of jurisdiction the judgment was perfectly competent to decide the question of indebtedness between those who alone could have created any indebtedness and who alone may discharge the same; B and C must have the exclusive right to settle, or to have settled by the agency of the courts, the nature of their own personal relations.

This is clearly put by Mr. Justice Holmes in *Brigham v. Fayerweather*, *supra*, where after saying that a judgment in rem is conclusive inter omnes, because it is an act of the sovereign power, he says: 'But the same is true when the judgment is that A recover a debt of B. The public force is pledged to collect the debt from B, and no one within the jurisdiction can oppose it.' The only way for the claimant to defeat the judgment creditor who has seized or is in pursuit of the property is to show that his claim is based upon purchase for value without notice. Such a judgment as that in question is admitted in Massachusetts to be *evidence* of debt. *Goodnow v. Smith*, 97 Mass. 69.

The judgment itself, as we have intimated, might however be within the statutes, by being given or permitted in fraud of creditors. Such creditors could of course show the fraud. *Bigelow, Estoppel*, *ut supra*; *Sheetz v. Hanbest*, *supra*; *Collins v. Cronin*, *supra*; *Biddle v. Thompson*, 115 Penn. St. 299. And according to the language of the statute (which is the same in regard to all cases, judgments as well as alienations), the judgment would be 'void'; void, that is to say, for the purpose of collateral impeachment, and for seizing property taken in virtue of it, without first proceeding to have the fraudulent judgment vacated. *Wiggins v. Armstrong*, 2 Johns. Ch. 144, was a case of judgments fraudulently obtained, but the point here made did not arise and was not considered. See also *Clark v. Anthony*, 31 Ark. 546, and cases cited. The statutes of nearly all the states in the Union treat judgments in the same way as by

is the case varied by the fact that a proceeding in a higher court, in the way of appeal, has been taken, which has the effect to set aside the judgment, if judgment is finally rendered in favor of the party appealed against.

But in some cases there may be place for the question whether a person claiming the benefit of the statute is a 'creditor or other.' It is not required by the statute, nor is it always absolutely necessary by other law, that one should have a judgment as a condition to having the benefit of the statute against fraudulent conveyances.¹ Thus it may be — and this is very common — that the laws of a state do not give a party bringing suit an attachment of the defendant's property as of course (as the laws of some of our states do), but permit an attachment only upon the making of an affidavit that the defendant is secreting or making away with his property, or is on the point of doing so.² In such a case there is room for construction, not only of the particular statute concerning the attachment, but it may be also of the general statute against fraudulent conveyances; the plaintiff may not be obviously and certainly a 'creditor or other' as

the statute of Elizabeth. In some states, as in Massachusetts and Delaware, the statutes relating to fraudulent conveyances are limited and special, and have nothing to say of judgments and of other things contained in the statute of Elizabeth; but the statute of Elizabeth is treated as part of the common law in such states, and it is not improbable that this would draw in judgments obtained in fraud of creditors with the force and effect of the statute, making them for this purpose void and not merely voidable.

¹ Moore v. Kidder, 55 N. H. 488; Witmer's Appeal, 45 Penn. St. 455; Cohen v. Meyers, 42 Ga. 46; Hyde v. Ellery, 18 Md. 496; Joseph v. McGill, 52 Iowa, 127. See also Haggarty v. Pitt-

man, 1 Paige, 298; New v. Bame, 10 Paige, 502; Thompson v. Diffenderfer, 1 Md. Ch. 489; Uhl v. Dillon, 10 Md. 500; Rosenberg v. Moore, 11 Md. 376; May v. Greenhill, 80 Ind. 124; Bowen v. Hoskins, 45 Miss. 183; Cottrell v. Moody, 12 B. Mon. 500; Fowler's Appeal, 87 Penn. St. 449; Scott v. Hartman, 26 N. J. Eq. 89; Portland Building Assoc. v. Creamer, 34 N. J. Eq. 107; Dodge v. Pyrolusite Manganese Co. 69 Ga. 665; Johnson v. Farnum, 56 Ga. 144; Jenkins v. Lockhard, 66 Ala. 377.

² Maitz v. Pfeifer, 80 Ky. 600; Berry v. O'Connor, 33 Minn. 29; McPike v. Atwell, 34 Kans. 142; Curtis v. Hoadley, 29 Kans. 566; Fitzgerald v. Gray, 59 Ind. 254.

he would be after obtaining judgment. And the same would be true in one of those cases in which the party is seeking to restrain the defendant by injunction¹ from conveying away his property with intent to delay or defraud, or is asking for a receiver, before having obtained judgment upon his demand.² And again it may be necessary to determine whether

¹ *Joseph v. McGill*, 52 Iowa, 127.

² *Moore v. Kidder*, supra; *Hayden v. Thrasher*, 18 Fla. 795; *Cohen v. Morris*, 70 Ga. 313; *Greiner v. Greiner*, 58 Cal. 115; *Witmer's Appeal*, supra; *Hyde v. Ellery*, supra; *Rosenberg v. Moore*, supra; and other cases in note 1, p. 140. Of course unless there is some special equity, no injunction will be granted. *Shufeldt v. Boehm*, 96 Ill. 560. A man's estate cannot be tied up under the statute against fraudulent conveyances, until the demand has been made certain by judgment. *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Adee v. Bigler*, 81 N. Y. 349; *Moran v. Dawes*, Hopk. Ch. 365; *Adler v. Fenton*, 24 How. 407, 411; *Portland Building Assoc. v. Creamer*, supra; *Shufeldt v. Boehm*, supra; *Horner v. Zimmerman*, 45 Ill. 14; *Bigelow v. Andross*, 31 Ill. 322; *Phelps v. Foster*, 18 Ill. 309; *Oberholser v. Greenfield*, 47 Ga. 530; *Cubbedge v. Adams*, 42 Ga. 124; *Peyton v. Lamar*, ib. 131; *Buchanan v. Marsh*, 17 Iowa, 494.

What the special equity must be does not appear to have been laid down broadly, and probably could not be. One or two particular instances may be given. In *Witmer's Appeal*, 45 Penn. St. 455, a suit for an injunction, it appeared that the plaintiff had obtained large judgments against one of the present defendants conceded to be insolvent, and that the land on which the judgments were a lien was insufficient. This land consisted of a

certain tract, having a grist-mill and a saw-mill upon it, with the usual machinery, all so annexed to the structure of the mills as to be part of the freehold. The debtor defendant had detached part of this machinery and converted it into personalty, to take it out of the lien and enable certain creditors, also defendants, to levy upon it; which they did, participating in his acts. They were subsequent creditors to the plaintiff, and according to the law of Pennsylvania (ante, p. 102), had no right to be paid first. This was held a case of fraudulent preference, 'intended and calculated to give a later judgment creditor an advantage over an earlier one,' in which all the defendants had participated.

In *Cohen v. Meyers*, 42 Ga. 46, it was held enough to take a case out of the ordinary rule and to give equity jurisdiction, that a purchaser from the debtor bought goods with intent to defraud the plaintiffs, that he never intended to pay for them, and that this fact was known to another defendant creditor who was also alleged to be concerned in the fraud. See also *Fowler's Appeal*, 87 Penn. St. 449; *Hyde v. Ellery*, 11 Md. 496; *Joseph v. McGill*, 52 Iowa, 127; *Haggerty v. Pittman*, 1 Paige, 288, where a debtor attempted to assign to an insolvent assignee, and creditors were allowed to have a receiver; *Rosenberg v. Moore*, 11 Md. 376, where a debtor assigned to a person of notoriously bad character, and a receiver was appointed;

a person claiming to be a creditor was already a creditor at the time of the alienation in question.¹ We must then consider the nature of those demands which in themselves put those who have them within the designation of the statute. The subject divides itself naturally into a number of special heads.

§ 2. ABSOLUTE UNDERTAKINGS.

Of creditors under absolute undertakings little need be said, where the undertaking takes the form of an actual agreement between the parties; in such cases ordinarily '*res ipsa loquitur*.' It may be observed however that he to whom an undertaking runs is a creditor, notwithstanding the fact that his apparent right is disputed, if it appears presumptively that he is entitled to recover. And accordingly a case is within the statute against fraudulent conveyances, where a promisor makes away with his property, or part of it, pending the decision of the dispute, with intent to forestall the promisee, unless the property is conveyed to some other creditor by way of preference.

But the term 'absolute undertaking' may be used in a broader sense; in a sense to cover certain implied contracts, and also what has been conveniently called 'quasi-contract.' Claimants by such obligations, equally with creditors *stricto sensu*, are within the protection of the statute. Thus a principal whose agent, at the time of making a fraudulent conveyance, holds securities for which he is liable to account to the former, is within the protection of the statute; and this regardless of the question whether he had made any demand for the same.² So also the right of a municipality to taxes, when it has fulfilled the preliminary requirements

Bowen v. Hoskins, 45 Miss. 183, relief against a cosurety; Cottrell v. Moody, 12 B. Mon. 500, 502.

¹ *Infra*, § 15.

² Young v. Heermans, 66 N. Y. 374. See also Pendleton v. Hughes, 65 Barb. 186.

of the law, makes it a creditor within the New York statute relating to the sale or assignment of goods;¹ and that statute being only a special application of the statute of Elizabeth, and in no respect peculiar,² the same would doubtless be true under the general statute against fraudulent conveyances.

§ 3. CONDITIONAL AND CONTINGENT UNDERTAKINGS.

The principle stated in regard to absolute undertakings is applicable also to conditional and to contingent undertakings. If it is shown that the condition has not been performed, or that the contingency has happened, and that the promisee is entitled to recover,³ then, though the matter may be in dispute between the parties, the promisee is a creditor from the first, and entitled to the protection of the statute. A conditional or a contingent claim is as much within the statutes from the outset as a claim that is certain and absolute.⁴

The very first case⁵ which arose under the statute of 13th Elizabeth, a case actually contemporaneous, being partly before and partly after the passage of the statute, was one of that kind; though judgment had been obtained before the benefit of the statute was prayed, and whether any question was raised whether the plaintiff was a creditor at the time of the conveyance, which was before the judgment, does not appear⁶ Most of the cases which have arisen upon con-

¹ *Stimson v. Wrigley*, 86 N. Y. 332.

² The statute is only a specific statement of the rule in *Twyne's Case*, 3 Coke, 80.

³ *Robinson v. Rogers*, 84 Ind. 539, where a suit to set aside a conveyance by a surety failed to show that any claim had accrued against the surety, and was accordingly held bad.

⁴ *Foot v. Cobb*, 18 Ala. 585; *Bibb v. Freeman*, 59 Ala. 612, 615; *Fearn v. Ward* 65 Ala. 33, 38; *Keel v. Larkin*, 72 Ala. 493. *Post v. Stiger*, 29 N. J. Eq. 554, 558; *Hoboken Bank v. Beek-*

man, 36 N. J. Eq. 83; s. c. 33 N. J. Eq. 53; *McLaughlin v. Bank of Potomac*, 7 How. 22, 28; *Shontz v. Brown*, 27 Penn. St. 123, 131; *Heath v. Page*, 63 Penn. St. 108; *Goodriche v. Taylor*, 2 DeG. J. & S. 141; *In re Ridler*, 22 Ch. D. 80; *Rider v. Kidder*, 10 Ves. 360.

⁵ *Dyer*, 294 b, 12 & 13 Eliz. (names of parties not stated).

⁶ The case was debt on bond (with condition) for one thousand marks, to which the defendant pleaded conditions performed. The parties having come

tingent or conditional undertakings have been cases in which judgment has already been obtained, and the question whether the party claiming the benefit of the statute was a creditor or not had regard to his relation to the supposed debtor before the judgment, and at the time of the conveyance.

The doctrine that a conditional or a contingent liability makes him a creditor to whom the engagement runs, from its inception, was laid down in New York in a case¹ which underwent much litigation, and also some vicissitudes in regard to some of the questions raised by it. With its various forms we are not here concerned; upon the subject now under consideration the rule laid down in the first stage of the case appears to have become the settled, general rule. A father, having guaranteed the payment of a judgment against S,—who had lands bound by the judgment, which at a fair value might be considered sufficient to pay the judgment,—disposed of the same to his son by what was alleged to be a voluntary conveyance (though it was finally held to be in part for value²). Afterwards the remaining property of S was exhausted by execution and proved in-

to issue upon a certain point, the defendant feared that the issue might be found against him; and accordingly, between the joinder of issue and the trial thereof, 'imagining by fraud, and covin, and collusion, to defraud the execution of the judgment, enfeoffed divers persons, scilicet, three of his friends by deed indented' to certain uses, with remainder to himself, and a proviso that upon payment or tender by him of 'a piece of gold of ten shillings value,' the feoffees should stand seised to his use. 'And notwithstanding the feoffment, he continually took the profits of the lands contained in the deed.' Judgment having been obtained by the plaintiff, and execution having issued, the sheriff was at a loss what to do, and simply made return of the facts, with-

out levying upon the lands, and asked for advice. Meantime however the statute had passed and was to operate (by its terms) retroactively from the beginning of the reign; and the court accordingly awarded a pluries execution. The judges differed in opinion what to do with the former writ and return, but finally disposed of the matter by an entry on the roll 'non misit breve,' which covered the difficulty with a fiction.

¹ Jackson v. Seward, 5 Cowen, 67; reversed as Seward v. Jackson, 8 Cowen 406; s. c. in error, in another form, as Van Wyck v. Seward, 18 Wend. 375, affirming (fifteen to fourteen) 6 Paige, 64, which had affirmed 1 Edw. 327.

² 8 Cowen, 406.

sufficient to satisfy the judgment. Judgment was now obtained against the father on his guaranty, and the lands conveyed by him as just mentioned were taken in execution and sold. In ejectment by the purchaser it was held *inter alia* that the party to whom the guaranty ran was a creditor at the time of the conveyance;¹ for though he could not then maintain an action upon the guaranty because as yet there had been no breach, still he was interested in the property conveyed, as a fund for the payment of the debt.²

In accordance with this principle the holder of an indorsed promissory note, bill of exchange, or check, whether the indorsement is for value or for accommodation,³ is a creditor of

¹ *Van Wyck v. Seward*, 18 Wend. 375, 383 et seq., Bronson, J. reviewing the authorities. After referring to other cases the learned judge said: 'This question was very fully considered in *How v. Ward*, 4 Greenl. 195, where it was held that the relation of debtor and creditor existed, although there was no express but only an implied contract between the parties, and although the liability of the person who executed the conveyance depended on a double contingency. Ward and Waterhouse became sureties to the sheriff for March, who was appointed a deputy. Waterhouse then conveyed his land to the plaintiff. The sureties were afterwards sued by the sheriff, who recovered a judgment against them, which was paid by Ward. The question was, whether Ward, at the date of the deed, was such a creditor of Waterhouse, his cosurety, as would authorize him to impeach the conveyance on the ground of fraud; and the court decided the point in his favor. It will be seen that the liability of Waterhouse to Ward, his cosurety, depended on a double contingency. It was in the first place uncertain whether they would ever become liable to pay

anything to the sheriff for the misconduct of the deputy, their principal; and should they become answerable for any default of his, it was uncertain whether Ward would pay more than his just proportion, and thus acquire the right of calling on Waterhouse for contribution; and yet the court held that Ward was a creditor of his cosurety, within the meaning of the statute, from the moment that they became obligors in the bond to the sheriff. The reasoning of Chief Justice Mellen on the question is, I think, conclusive.' For later authorities to the same effect see *Young v. Heermans*, 66 N. Y. 374, 384; *Post v. Stiger*, 29 N. J. Eq. 554, 559, approving apparently the view of Bronson, J.

² Bronson, J. *ut supra*, quoting Mellen, C. J. in *How v. Ward*, *supra*.

³ *Hamet v. Dundass*, 4 Barr, 178. Rogers, J. at p. 182: 'It is nothing to the purpose that Averill was an indorser not fixed for the money, for there is a responsibility arising from his position of indorser, an eventual liability from which he cannot escape by a fraudulent sale.' See also *Cook v. Johnson*, 1 Brsl. 51 (accommodation indorser after

the indorser from the time the indorsement was executed, though the same (when demand and notice are not waived) is both conditional and contingent. In like manner one who indorses negotiable paper for the accommodation of another is a creditor of the latter from the outset.¹ The same is true of a covenantee in a covenant of general warranty, who has been evicted by title paramount and outstanding at the time the covenant was executed;² also of a covenantee in a covenant of seisin broken;³ also in cases of the liability of a surety to his principal,⁴ or to make contribution to his co-surety who has paid more than his share,⁵ although there is in such a case a 'double contingency.'⁶

In like manner a surety is creditor of his principal from the time of the undertaking in suretyship, and is entitled to the benefit of the statute in respect of conveyances made by his principal, before as well as after default, in fraud of the surety's possible claim for indemnity.⁷ A surety may accordingly protect himself from liability, before default, by taking a transfer of property, in good faith, from his principal by way of reasonable indemnity.⁸ Again it is held in

notice); *Phelps v. Morrison*, 9 C. E. Green, 198; s. c. 10 C. E. Green, 538 (same); *Post v. Stiger*, 29 N. J. Eq. 554; *Clement's Appeal*, 52 Conn. 464.

¹ *Rogers v. Abbott*, 128 Mass. 102.

² *Gunnard v. Eslava*, 20 Ala. 732; *Bibb v. Freeman*, 59 Ala. 612; *Post v. Stiger*, 29 N. J. Eq. 554.

³ *Post v. Stiger*, supra.

⁴ *Shurts v. Howell*, 30 N. J. Eq. 418; *Hayden v. Thrasher*, 18 Fla. 795. See *Kelly v. McGrath*, 70 Ala. 76; *Pashby v. Mendigo*, 42 Mich. 172; *Keel v. Larkin*, 72 Ala. 493; *Snedecor v. Watkins*, 71 Ala. 49, where the Statute of Limitations was successfully pleaded; *Tyberandt v. Rancke*, 96 Ill. 71.

⁵ *Rynearson v. Turner*, 52 Mich. 7;

Crawford v. Kirksey, 50 Ala. 590; *Jenkins v. Lockhard*, 66 Ala. 377; *Bragg v. Patterson*, 85 Ala. 233; *Shurts v. Howell*, 30 N. J. Eq. 418; *Hayden v. Thrasher*, 18 Fla. 795; *Mason v. Pieron*, 69 Wis. 585; *How v. Ward*, 4 Greenl. 195; *Williams v. Banks*, 11 Md. 242; *Bowen v. Hoskins*, 45 Miss. 183.

⁶ *Bronson, J. in Van Wyck v. Seward*, 18 Wend. 375, 383, supra, p. 145, note.

⁷ *Loughridge v. Bowland*, 52 Miss. 546; *Rogers v. Abbott*, 128 Mass. 102. For a case of conveyance by the principal after default see *Hatfield v. Merod*, 82 Ill. 113.

⁸ *Rogers v. Abbott*, 128 Mass. 102; *Welsch v. Werschem*, 92 Ill. 115;

this country, contrary to the English doctrine, that an antenuptial conveyance, made by a husband in fraud of the expectant or contingent right of the wife to dower and homestead, or (it seems) other specific legal right of the wife consequent upon the marriage,¹ may be avoided by the wife;² the wife's right being of the same nature as the husband's in the converse case.³ And the wife is of course similarly within the protection of the statute in respect of *postnuptial* conveyances by the husband in fraud of her contingent rights.⁴

In all these and the like cases the 'creditor's' rights run back, under the statutes against fraudulent conveyances, to the beginning of the conditional or contingent right.⁵ But all this supposes that in the end such right becomes fixed,—is not discharged.⁶

Goodheart v. Johnson, 88 Ill. 58; *Mead's Appeal*, 46 Conn. 417; *Gould v. Hurts*, 61 Iowa, 45; *Bryant v. Fink*, 75 Iowa, 516; *Pennington v. Woodall*, 17 Ala. 685; *Troy v. Smith*, 33 Ala. 469; *Beatty v. Dudley*, 80 Ky. 381. Or the surety may acquire the property of his principal by purchase, for protection; and this though with knowledge of the debtor's purpose to hinder other creditors by the sale. It is only a case of preference. *Albert v. Besel*, 88 Mo. 150.

¹ See chapter 18, § 10.

² *Kelly v. McGrath*, 70 Ala. 76, citing *Swaine v. Perine*, 5 Johns. Ch. 482; *Cranson v. Cranson*, 4 Mich. 230; *Petty v. Petty*, 4 B. Mon. 215; *Tate v. Tate*, 1 Dev. & B. Eq. 22; *Smith v. Smith*, 2 Halst. Ch. 515; *Jenney v. Jenney*, 24 Vt. 324; *Dearmond v. Dearmond*, 10 Ind. 10. See also to the same effect *Brown v. Bronson*, 85 Mich. 415; *Leach v. Duvall*, 8 Bush, 201; *Littleton v. Littleton*, 1 Dev. & B. 327; *Jones v. Roberts*, 65 Maine, 273.

The rule is statutory in North Carolina. As to Kansas law see *Butler v. Butler*, 21 Kans. 521. The English rule is contra. Vol. 1, p. 610. The wife will not become entitled to dower upon the successful impeachment of a conveyance in fraud of creditors made by the husband before marriage. *Gross v. Lange*, 70 Mo. 45. Further see *Feltz v. Walker*, 49 Conn. 93.

³ Vol. 1, pp. 604–610.

⁴ *Buzick v. Buzick*, 44 Iowa, 259; *Straat v. O'Neil*, 84 Mo. 68.

⁵ And this is true as regards changes in the law meantime; the rights of the creditor are those under which the contingent undertaking was entered into, not as they might have been under a later modification of the law, as e. g. the law of homestead. *Keel v. Larkin*, 72 Ala. 493. See *Peerey v. Cabannis*, 70 Ala. 253; *Fears v. Ward*, 65 Ala. 33; *Nelson v. McCreary*, 60 Ala. 301; chapter 14, at the end.

⁶ *Janvrin v. Janvrin*, 60 N. H. 169, where a wife's libel for divorce was dis-

§ 4. CASES OF LIQUIDATED CLAIMS.

This head includes cases of tort; as including cases of contract it would be almost unnecessary to mention it after what has been said. A single example in contract, the case of a covenant of seisin, may be mentioned; in such a case the covenantee's damages are fixed, being limited to the consideration paid and interest.¹ But it is equally true that one who is entitled to liquidated damages for tort is within the designation of 'creditors and others' of the statute; as in the case of goods lost by a carrier, the value of which has been agreed, or in the case of bonds or other securities wrongfully appropriated.²

§ 5. CASES OF UNLIQUIDATED CLAIMS.

Equally within the protection of the statutes against fraudulent conveyances are those who are entitled to recover damages or sums of money one knows not of what amount, whether large or small, until a jury or a judge has assessed them. Several cases of the kind have been referred to in previous pages of this volume. Such are damages for breach of contract of marriage,³ claims for pecuniary aid by a wife in a suit for divorce, claims for alimony,⁴ claims of a wife

missed, and with it any contingent claim for alimony.

¹ *Post v. Stiger*, 29 N. J. Eq. 554, 558; *Stewart v. Drake*, 4 Halst. 139; *Holmes v. Sinnickson*, 3 Green, 313; *Morris v. Rowan*, 2 Harr. (N. J.) 305.

² *Pendleton v. Hughes*, 65 Barb. 136; *Young v. Heermans*, 66 N. Y. 374.

³ *Ex parte Mercer*, 17 Ch. D. 290; *Shoutz v. Brown*, 27 Penn. St. 123, 131; *Hoffman v. Junk*, 51 Wis. 613; *McVeigh v. Ritenour*, 40 Ohio St. 107.

⁴ *Bouslough v. Bouslough*, 68 Penn. St. 495; *Chase v. Chase*, 105 Mass.

385; *Allen v. Allen*, 100 Mass. 373; *Livermore v. Boutelle*, 11 Gray, 217; *Plunkett v. Plunkett*, 114 Ind. 484; *Green v. Adams*, 59 Vt. 602; *Verner v. Verner*, 64 Miss. 184; *Hinds v. Hinds*, 80 Ala. 225; *Pickett v. Garrison*, 76 Iowa, 347; *Blenkinsopp v. Blenkinsopp*, 1 De G. M. & G. 495; ante, pp. 12, 81. See also *Stuart v. Stuart*, 123 Mass. 370; *Burrows v. Purple*, 107 Mass. 428, 435; *Lillis v. Gallagher*, 39 N. J. Eq. 93, false imprisonment.

for support suitable to her husband's station in life, where she has been compelled by his misconduct to leave him, or where she is entitled for any reason to separate maintenance,¹ and a great variety of other claims both in contract and in tort.² It matters not that it may be extremely doubtful, *a priori*, whether the claimant will be entitled to recover; an apparent right of action, or right to the aid of the court, is enough when it is necessary for the party to have relief before judgment.

In one of the cases cited,³ a leading case in this country, the plaintiff brought an ejectment for lands sold under execution to one under whom he derived title. An action for slander had been brought, pending which, and to defeat the same, the lands in question had been conveyed by the then defendant to one who stood only upon his rights. It was argued for the present defendant that the plaintiff in the execution had no debt or demand at the time the conveyance was executed; that an action arising *ex maleficio* was not enough; but the court held the contrary.⁴ Trespass gener-

¹ *Tyler v. Tyler*, 126 Ill. 525.

² *Ante*, p. 12, note; *Jackson v. Myers*, 18 Johns. 425; *Post v. Stiger*, 29 N. J. Eq. 554; *Scott v. Hartman*, 26 N. J. Eq. 89; *Clapp v. Leatherbee*, 18 Pick. 131; *Tobie Manuf. Co. v. Waldron*, 75 Maine, 472; *Hall v. Sands*, 52 Maine, 355; *Evans v. Lewis*, 30 Ohio St. 11; *Welde v. Scotten*, 59 Md. 72; *Stevens v. Works*, 81 Ind. 445; *Bongard v. Block*, 81 Ill. 186; *Miller v. Dayton*, 47 Iowa, 312; *Weir v. Day*, 57 Iowa, 84; *Wolf v. Chandler*, 58 Iowa, 569; *Farnsworth v. Bell*, 5 Sneed, 531; *Harris v. Harris*, 23 Gratt. 737, 764; *Lyne v. Wann*, 72 Ala. 43; *Ford v. Johnston*, 7 Hun, 563; *Wilcox v. Fitch*, 20 Johns. 472; *King v. Wilcox*, 11 Paige, 589. The Married Woman's Act of Maine will not protect a wife to whom her husband has voluntarily con-

veyed property to defeat an action for tort. *Tobie Manuf. Co. v. Waldron*, *supra*.

In two or three states tort-feasors are deemed without the statutes. *Hill v. Bowman*, 35 Mich. 191; *Green v. Adams*, 59 Vt. 602; *Brooks v. Clayes*, 10 Vt. 37; *Beach v. Boynton*, 26 Vt. 725; *Fox v. Hills*, 1 Conn. 299; *Fowler v. Frisbie*, 3 Conn. 324.

³ *Jackson v. Myers*, 18 Johns. 425. The case of *Mountford v. Ranie*, Keb. 99, was referred to, as one in which the majority of the court had decided a conveyance to be fraudulent where the plaintiff had only become creditor by the escape of a prisoner, though the bond upon which the judgment was rendered was long subsequent to the conveyance in question.

⁴ So in *Clapp v. Leatherbee*, 18 Pick.

ally furnishes another example actually adjudicated ;¹ trespass for assault and battery furnishes another ;² selling intoxicating liquor to the damage of the plaintiff, within a statute, another ;³ seduction another ;⁴ liability in bastardy proceedings another ;⁵ conversion still another.⁶

§ 6. EQUITABLE CLAIMS.

The statute protects those whose claims are of an equitable nature as well as those whose claims are legal. This is seen in cases already mentioned, of the claim of a wife for separate maintenance, or for alimony before suit for divorce has been set on foot.⁷ The wife's equity to a settlement would also no doubt bring her within the designation of 'creditors and others ;' so of contracts in favor of a wife touching her equitable separate estate ;⁸ so of marriage settlements between a husband and trustees, whereby the wife is to receive money in case she survive her husband ;⁹ so of a partner's equity to an account and division of profits on dissolution of the partnership ; and so of all other cases of rights in equity.

131, 138 ; *Stevens v. Works*, 81 Ind. 445 ; *Shean v. Shay*, 42 Ind. 375 ; *Cooke v. Cooke*, 43 Md. 522 ; all being cases of slander. Contra under the narrower statute of Connecticut. *Fowler v. Frisbie*, 3 Conn. 320 ; *Fox v. Hills*, 1 Conn. 275.

¹ *Scott v. Hartman*, 26 N. J. Eq. 89 ; *Harris v. Harria*, 23 Gratt. 737 ; *Welde v. Scotten*, 59 Md. 72 ; *Cole v. Terrell*, 71 Texas, 549 ; *Barling v. Bishopp*, 29 Beav. 417 ; *Lillis v. Gallagher*, 39 N. J. Eq. 93, false imprisonment ; *Westmoreland v. Powell*, 59 Ga. 256.

² *Martin v. Walker*, 12 Hun, 46.

³ *Weir v. Day*, 57 Iowa, 84 ; *Wolf v. Chandler*, 58 Iowa, 569.

⁴ *Hunsinger v. Hofer*, 110 Ind. 390 ; *Bishop v. Redmond*, 83 Ind. 157 ; *Simons v. Busby*, 119 Ind. 13.

⁵ *Schuster v. Stout*, 30 Kans. 529 ; *Damon v. Bryant*, 2 Pick. 411, dictum.

⁶ *Lyne v. Wann*, 72 Ala. 43.

⁷ *Livermore v. Boutelle*, 11 Gray, 217 ; *Bailey v. Bailey*, 61 Maine, 361 ; *Tobie Manuf. Co. v. Waldron*, 75 Maine, 472, 474 ; ante, p. 148. If the wife join her husband in conveying land in fraud of his creditors, she cannot in a suit for divorce have the conveyance set aside so as to subject the land to a claim for alimony. *Barrow v. Barrow*, 108 Ind. 345. See ante, pp. 65-67.

⁸ See § 7.

⁹ *Rider v. Kidder*, 10 Vea. 360.

§ 7. PERSONS UNDER DISABILITY.

It matters not that one who claims as creditor by contract is not *sui juris*; disability is matter of *defence* to the party under the same;¹ the other has no benefit of it. Thus an adult who has contracted with an infant cannot defend suit upon the contract by alleging the plaintiff's infancy;² and hence he could not make a valid conveyance of his property to defeat the infant's claim. The same would be true of one who has contracted with a lunatic; a lunatic's contract even against himself is, by the better authorities, voidable only,³ and in his own favor it is perfectly valid. But even if, with some of the cases, the contract of a lunatic not made in a lucid interval, is to be held void, it is void only against the lunatic; and the lunatic would be within the protection of the statutes against fraudulent conveyances. Again it has been held that an infant can become his father's creditor, within the statutes against fraudulent conveyances, by an agreement of the father to pay him for his services.⁴ This, by the better view, could be true only in those cases in which the infant has become legally or practically emancipated from the father's authority.⁵

¹ Of course an infant may be a debtor in contract, by a valid ratification after he comes of age. *Trowell v. Shenton*, 8 Ch. D. 318, C. A. an important case in which it was held that a particular postnuptial conveyance by one now of age was not a ratification of an antenuptial promise made when under age.

² *Kendall v. Titus*, 9 Heisk. 727.

³ *Carrier v. Sears*, 4 Allen, 336; *Allis v. Billings*, 6 Met. 415; *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Burke v. Allen*, 29 N. H. 106; *Ashcraft v. De Armond*, 44 Iowa, 229; *Riggan v. Green*, 80 N. Car. 236. Contra, *Rogers v. Blackwell*, 49 Mich. 192.

⁴ *Atwood v. Holcomb*, 39 Conn. 270;

Clemens v. Brillhart, 17 Nev. 335; *Danley v. Rector*, 5 Eng. 211, where the infant, living with his father, was allowed against the father's creditors to hold property given to him in payment of such bargained-for services; nor was there any real change of possession. The case wears a doubtful look.

⁵ *Nightingale v. Withington*, 15 Mass. 272; *Godfrey v. Hayes*, 6 Ala. 501; *Lyon v. Bolling*, 14 Ala. 753; *Stovall v. Johnson*, 17 Ala. 14; *Donegan v. Davis*, 66 Ala. 362. Most of these cases appear to require that the child should not remain in the father's family, for the purpose of emancipation. But see contra *McCloskey v. Cyphert*,

A special remark should be made in respect of the contracts of married women, at common law. Such contracts, when not relating to the wife's separate estate, are void, and not voidable merely, against the party under disability; but as running in favor of such party they are enforceable, — by the husband during the marriage, by the wife afterwards if the husband did not 'reduce' them into his possession and make collection or appropriate them.¹ That is to say, the wife may be a creditor within the statutes against fraudulent conveyances; but she can be only a creditor in suspense during the marriage.² If the husband has exercised his right, he is the creditor; but if he has not obtained payment of or appropriated the claim during the marriage, then the wife becomes creditor. When, after the marriage has come to an end, the wife's right to the demand left unenforced by the husband revives, she is to be treated, it is apprehended, as a creditor from the date of the demand, for the purposes of the statutes under consideration.

Conversely, while a married woman cannot be sued, at

27 Penn. St. 220; *Donegan v. Davis*, supra; *Johnson v. Silsbee*, 49 N. H. 543. See also *Danley v. Rector*, supra.

There should be a clear agreement at the outset for the payment of services in these cases of members of the same family living together. *Faloon v. McIntyre*, 118 Ill. 292, where a son-in-law's claim for the support of his wife's father and mother who lived with him was not allowed for want of agreement; *Patton v. Conn*, 114 Penn. St. 183. Further see chapter 18, § 7.

¹ 'At common law the husband was entitled absolutely to all the property which the wife acquires by her skill or labor. He cannot renounce his right to such services or earnings to the prejudice of existing creditors. *Bump on Fraudulent Conveyances*, 248. And there is nothing in our statutory system to ab-

rogate this principle. *Glaze v. Blake*, 56 Ala. 379.' *Somerville, J.* in *Gordon v. Tweedy*, 71 Ala. 202.

² It is held that in the absence of evidence the common law on this subject will be presumed to prevail in Georgia. *McAnally v. O'Neal*, 56 Ala. 299. But it would hardly be right to indulge such a presumption generally, of all states, against what is notorious. In *McAnally v. O'Neal* this presumption was applied to the matter of the wife's earnings in Georgia; the husband was held entitled to them (*McLemore v. Pinkston*, 31 Ala. 216) in the absence of evidence of a different law in that state. That appears to be the law, to a certain extent, in states in which the common law has been much changed by statute. *Triplett v. Graham*, 58 Iowa, 135. See *infra*, p. 155, note.

common law, for her debts contracted before the marriage, since by marriage the husband becomes liable for them (jointly with the wife, in the matter of remedy);¹ still if suit is not brought during the coverture, the wife's liability thereafter revives, and the person to whom the debt is due now becomes her creditor again, supposing the claim not to have become barred.² And the same would be true in equity, in respect of property settled to the wife's separate use, where the creditor obtained judgment against both of them during coverture, and the husband has since become bankrupt and obtained his discharge. The creditor is now deemed to be a creditor of the wife in respect of such separate estate, and may in equity have the protection of the statute against any conveyance by her calculated to defeat any unpaid part of the debt; the wife's separate property not being affected by the husband's discharge.³

¹ *Chubb v. Stretch*, L. R. 9 Eq. 555; *Vanderheyden v. Mallory*, 1 Comst. 452.

² *Ib.*

³ At law the discharge of the husband would be a discharge of the wife also. *Ib.*; *Lockwood v. Salter*, 5 Barn. & Ad. 303; *Miles v. Williams*, 1 P. Wms. 249, 259.

'This lady,' said Malins, V. C. in *Chubb v. Stretch*, *supra*, 'has made a settlement of all her property to her separate use during the joint lives of herself and her husband, and it would be most unjust and inequitable that she should deprive her creditors of the payment of their debts. Is she entitled to do so? There is no question that debts incurred by a married woman may be enforced against her separate estate. It is also perfectly clear that if a man, by a marriage settlement, reserves a life estate for himself in the settled property, that life estate is liable to his creditors. Why should not the same rule apply to the woman? . . . But there is a tech-

nical difficulty, that the wife is personally discharged by the discharge in bankruptcy of her husband. Does it however follow that her property is also discharged? I think that the authorities which have been cited show that it does not.' To the same effect, *Dickson v. Miller*, 11 Smedes & M. 594; *Hamlin v. Bridge*, 24 Maine, 145; *Vanderheyden v. Mallory*, 1 Comst. 452.

The case is put thus in *Dickson v. Miller*, just cited: 'The ground upon which it has been settled, as a general rule, that the debts of a wife "dum sola" are discharged by the bankruptcy of the husband, as well as his own, is based upon the principle that all her estate being in his power, and everything in his power being assignable, the estate which the wife brought the husband falls into the hands of the commissioners in bankruptcy for the benefit of all creditors both of husband and wife. 1 P. Wms. 259. But this is the case of a wife holding a separate estate, which

A wife further may be a creditor of her husband for the purposes of the statutes against fraudulent conveyances; that is to say, the husband may not only make payment, in cash or property, to his wife of a proper claim by her against him, which will be good against other creditors,¹ but the wife will

cannot come into the possession of the husband or be assigned in bankruptcy for his debts.' This was said in a case in which it was sought to subject the wife's separate estate in equity to the payment of necessities furnished to her while sole and a minor; and this after judgment for the husband and wife in a suit at law for payment, because of the husband's discharge in bankruptcy. See also the explanation in *Vanderheyden v. Mallory*, *supra*.

¹ *Atlantic Bank v. Taverner*, 130 Mass. 407; *Draper v. Buggee*, 133 Mass. 258; *Medsker v. Bonebrake*, 108 U. S. 66; *Patton v. Conn*, 114 Penn. 183; *Babcock v. Eckler*, 24 N. Y. 623; *Savage v. O'Neil*, 44 N. Y. 298; *Whiton v. Snyder*, 88 N. Y. 299; *Booth v. Galt*, 58 Cal. 254; *Greiner v. Greiner*, *ib.* 115 (conversion of wife's money); *Tomlinson v. Matthews*, 98 Ill. 178; *Patrick v. Patrick*, 77 Ill. 555; *Hoes v. Boyer*, 108 Ind. 494; *Stone v. Brown*, 116 Ind. 78; *Secor v. Souder*, 95 Ind. 95; *Hogan v. Robinson*, 94 Ind. 138; *Brookville Bank v. Kimble*, 76 Ind. 195 (debt barred by limitation); *City Bank v. Wright*, 68 Iowa, 132 (same); *Kennedy v. Powell*, 34 Kans. 22 (same); *Allen v. Antisdale*, 38 Mich. 229; *Jordan v. White*, 38 Mich. 253; *Darling v. Hurst*, 39 Mich. 765; *Headington v. Langland*, 65 Iowa, 276; *Jones v. Brandt*, 59 Iowa, 332; *Sims v. Moore*, 74 Iowa, 497; *Staney v. Laning*, 58 Iowa, 662; *Farnham v. Kennedy*, 28 Minn. 365; *Savage v. Dowd*, 54 Miss. 728; *Kaufman v. Whitney*, 50 Miss. 103; *Crane v. Barkdoll*, 59 Md. 634; *Ferguson v. Spear*, 65

Maine, 277; *Besson v. Eveland*, 26 N. J. Eq. 468; *Coleman v. Smith*, 55 Ala. 368 (conversion of wife's separate property); *Warren v. Jones*, 68 Ala. 449; *Converse v. Hartley*, 31 Conn. 372; *Comer v. Allen*, 72 Ga. 1; *Booher v. Worrill*, 55 Ga. 332.

Accordingly release of dower will support a reasonable conveyance of property by the husband to the wife. *Gordon v. Tweedy*, 71 Ala. 202; *Bank of United States v. Lee*, 13 Peters, 107; *Hershy v. Latham*, 46 Ark. 542; *Brown v. Rawlings*, 72 Ind. 505. But see *Haynes v. Kline*, 64 Iowa, 308. But transactions between husband and wife may often call for scrutiny. *Hershy v. Latham*, *supra*; *Gordon v. Tweedy*, *supra*; *Kennedy v. Powell*, *supra*; *Besson v. Eveland*, *supra*; *Post v. Stiger*, 29 N. J. Eq. 556. See however *Kennedy v. Whitney*, 50 Miss. 108. And see chapter 8, § 2. In *Besson v. Eveland*, *supra*, it is laid down that where a wife claims a trust in lands conveyed absolutely to her husband, on the ground e. g. that she furnished the purchase-price, the claim should be regarded with suspicion; and when asserted against creditors, upon the evidence of the parties alone, it should be rejected, unless the statements are so full, clear, and convincing as to make the fairness and justice of the claim manifest. See also *Post v. Stiger*, 29 N. J. Eq. 556; *Lee v. Cole*, 44 N. J. Eq. 328. Comp. chapter 8, § 2.

But in a proper case the husband may convey to his wife, or to her nominee, property really belonging to her the title

on the other hand be entitled to the benefit of the statute in case of any conveyance by the husband in fraud of her rights. Property of the wife which on marriage becomes (at common law or by statute) the husband's by operation of law, does not fall within this principle; and his postnuptial promise to pay for it will not make the wife his creditor, so as to justify him in making a conveyance to her in respect of it, against his own creditors¹ or to enable the wife to treat as invalid any

to which he has taken in his own name, or in his name and hers jointly, as e. g. where the money to pay for it came from the wife; and so no doubt in the converse case. As to the wife's claim see *Besson v. Eveland*, supra; *City National Bank v. Hamilton*, 34 N. J. Eq. 158; *Bancroft v. Curtis*, 108 Mass. 47; *Van Deuzer v. Peacock*, 11 Neb. 245 (to wife's nominees); *Converse v. Hartley*, 31 Conn. 372 (joint grantees); *Bremmerman v. Jennings*, 101 Ind. 253 (same); *Taylor v. Duesterberg*, 109 Ind. 165; *Leonard v. Barnett*, 70 Ind. 367; *Eagan v. Downing*, 55 Ind. 65; *Tomlinson v. Matthews*, 98 Ill. 178 (an important case); *Seeders v. Allen*, ib. 468 (joint grantees); *Bennet v. Stout*, ib. 47. See also *Jones v. Snyder*, 117 Ind. 229.

And the husband may perhaps pay interest, though not stipulated, on money loaned to him by his wife. *Goff v. Rogers*, 71 Ind. 459. As to what will make a proper case for such conveyance, see *Besson v. Eveland*, supra; *City National Bank v. Hamilton*, supra; *Bancroft v. Curtis*, supra; *Tomlinson v. Matthews*, supra; *Seeders v. Allen*, supra; *Ray v. McPherson*, 11 Neb. 197; *Van Doon v. Leeper*, 98 Ill. 85; *Wertman v. Price*, 47 Ill. 22; *Patten v. Gates*, 67 Ill. 164; *Hackett v. Bailey*, 86 Ill. 74; *Aber v. Brant*, 36 N. J. Eq. 116; *Beecher v. Wilson*, 84 Va. 813. These authorities, as appears from *Tomlinson v.*

Matthews, *Seeders v. Allen*, and other cases, generally turn upon the wife's holding out the husband as owner. See ante, p. 44, and note.

Further and more generally see *Hoey v. Pierron*, 67 Wis. 262 (mortgage by husband to wife, and effect of a statute thereon); *Seitz v. Mitchell*, 94 U. S. 582; *Paulk v. Cooke*, 39 Conn. 566; *Rutherford v. Chapman*, 59 Ga. 177; *Booher v. Worrill*, 55 Ga. 332; s. c. 57 Ga. 235.

As to moral obligations see post, § 9.

¹ *Jaffrey v. McGough*, 83 Ala. 202; *Early v. Owens*, 68 Ala. 171, overruling *Brevard v. Jones*, 50 Ala. 241 (see *Warren v. Jones*, 68 Ala. 449); *Bolling v. Jones*, 67 Ala. 508; *Coleman v. Smith*, 55 Ala. 368; *Anderson v. Anderson*, 80 Ky. 638; *Bayne v. State*, 62 Md. 100; *Sloan v. Torry*, 78 Mo. 623. See chapter 18, § 7. On the subject of *Early v. Owens*, supra, the husband's rights to rents of the wife's separate estate, see *Booher v. Worrill*, 55 Ga. 332 (s. c. 57 Ga. 235), which seems to support *Brevard v. Jones*.

At common law a wife's earnings would of course belong to her husband; and this will be true still except in so far as statute has made a change. *Triplett v. Graham*, 58 Iowa, 135. A gift may however be made to the wife as a reward for gratuitous services rendered by her to a third person, as e. g. to her father; and if the husband should take

conveyance made by the husband to another. On the other hand the husband may be creditor of the wife, under the statutes against fraudulent conveyances.¹

The general rule stated at the beginning of the present section applies to corporations whose contracts may for some purpose be wanting in binding force. If the corporation is not so disqualified by law to make the particular contract as to render the contract either actually illegal or void, it is not for the other party to set up any defence to its enforcement which the corporation itself might make if sued upon the contract;² unless indeed it appeared to be agreed that the

the gift, he would be bound to account for it, and hence could make it good, without danger of his creditors. *Patton v. Conn*, 114 Penn. St. 183. *Secus* (apart from statute) if the services were not gratuitous. *Ib.*

In some states the statutes have made the wife a feme sole for all purposes of property received by her; in others she is entitled to her earnings only when made in some independent business. *Triplett v. Graham*, *supra*. See *McAnally v. O'Neal*, 56 Ala. 299; *Glaze v. Blake*, 56 Ala. 376; *McLemore v. Nickolls*, 37 Ala. 662; *Pinkston v. McLemore*, 31 Ala. 308. But the statutes are liberally construed in this matter, in the interest of the wife. *Darling v. Hurst*, 39 Mich. 765, wife's earnings on salary in a hospital; *Gilbert v. Glenney*, 75 Iowa, 513, wife keeping boarders; *Mewhirter v. Hatten*, 42 Iowa, 288, washing wages; *Bartlett v. Umfried*, 94 Mo. 530, keeping boarders, and washing and mending for them, with the husband's consent; *Kidwell v. Kirkpatrick*, 70 Mo. 214, consent of husband; *Coughlin v. Ryan*, 43 Mo. 99, same. Further as to the wife's earnings, see *Bridgers v. Howell*, 27 S. Car. 425; *Syme v. Riddle*, 88 N. Car. 463.

If the husband give property lawfully to his wife, and afterwards convert it to his own use, the wife is within the protection of the statutes. *Walton v. Atkinson*, 84 Ala. 592. Or he may borrow the same from his wife, creating her thereby his creditor under the statutes. *Savage v. O'Neil*, 44 N. Y. 298.

As to gifts by the wife to the husband see *Bailey v. Kansas Co.* 32 Kans. 73; *Luers v. Brunjes*, 34 N. J. Eq. 19 and 561; *Sloan v. Torry*, 78 Mo. 623; *Robinson v. Brems*, 90 Ill. 351.

¹ *Tyberandt v. Rancke*, 96 Ill. 71; *Tomlinson v. Matthews*, 98 Ill. 178.

² *Oregonian Ry. Co. v. Oregon Ry. Co.* 10 Sawy. 464 (where this subject was much considered; the case reversed 130 U. S. 1, but not on this point, the contract now being deemed void on both sides contrary to the view of the lower court); *Cowell v. Colorado Springs Co.* 100 U. S. 61; *Close v. Glenwood*, 107 U. S. 466, 477; *Whitney v. Robinson*, 53 Wis. 309; *Black River R. Co. v. Clarke*, 25 N. Y. 208; *Eaton v. Aspinwall*, 19 N. Y. 119; *Bigelow, Estoppel*, 465, 466, 5th ed. and many cases cited. Where a contract with a corporation is void on the part of the corporation, the corporation may terminate it after having acted

other party might avail himself of any want of power or of any defective execution of power by the corporation.¹ Hence it would not be ground for refusing the aid of the court before judgment (if that should be shown to be necessary) that the defect should appear upon the face of the contract, unless the defect were vital to the powers of the corporation.

§ 8. VOIDABLE CONTRACTS.

If a person's demand, not having been reduced to judgment, appears to be voidable upon its face or upon the facts shown, it is not likely that a court would treat the plaintiff as a creditor within the meaning of the statute, upon any footing that it might turn out at the trial that the demand was really enforceable.² It is true that voidable contracts are for certain purposes valid until properly avoided;³ but it is apprehended that interference with the debtor's dispositions of his property is not one of those purposes. The plaintiff must show a clear presumptive right of action in force against the alleged debtor, to justify the court in granting an injunction or a receiver or other remedy in the way of restraint upon alienation, or in any other way treating him as a creditor for the purposes of the statute against fraudulent conveyances.⁴

upon it as if it were valid. *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1. But this would not, it seems, put an end to any rights it had already acquired in performing the contract; it would only terminate the business for the future, as in the case just cited.

¹ See *Lehman v. Warner*, 61 Ala. 455; *Bigelow, Estoppel*, ut supra.

² As to cases under the Statute of Limitations, Statute of Frauds, and the like, see ante, pp. 133-135.

³ Vol. 1, pp. 73, 617.

⁴ *Fuller v. Bean*, 30 N. H. 181 (note for price of intoxicating liquor sold

in violation of law); *Edward v. McGee*, 31 Miss. 143 (suit barred by Statute of Limitations); *Baker v. Gilman*, 52 Barb. 26, 37; *Townsend v. Tuttle*, 28 N. J. Eq. 449; *Bruggerman v. Hoerr*, 7 Minn. 337. Of course a demand is not to be treated as invalid because the party against whom it runs declares it to be invalid. 'It is however urged with much ingenuity and force,' said Christian, J. in *Harris v. Harris*, 23 Gratt. 737, 764, that 'this case does not come within the operation of the Statute of Frauds [the statute against fraudulent conveyances]; be-

It may be however that a demand apparently voidable has by the conduct of the debtor become binding; if that can be shown, the plaintiff will of course be a creditor. The very fact that the other party had made, or was about making, a conveyance (not as a preference) for the purpose of defeating the demand, might perhaps be considered upon the question whether the contract had become validated. However the fact could not be strong evidence; it would only indicate the party's fears; of itself it could not be considered sufficient. But to validate the contract it would not be necessary for the plaintiff to show that the other party had ratified it. If a party entitled to rescind an undertaking of his should put it out of his own power to make restoration of anything which he may have received, not being money

cause these bonds were not given to hinder and delay *creditors*, but only to protect the defendant against the assertion of unjust demands, which he apprehended might be recovered against him because of the "unfavorable and unjust constitution of courts and juries at that time" [just after the close of the rebellion]; that there was no fraudulent intent to secure his property against the claims of *creditors*; but the scheme resorted to was one intended for protection against unjust claimants. Now it must be conceded that a party claiming damages for the acts of another must be regarded in law as much the creditor of that other as one holding his bonds or other promises to pay. Every person having a legal demand against another is his creditor, whether that demand is one sounding in damages or one that comes under a contract. . . . And it is to my mind equally plain that the question whether the demand asserted is a just and legal one, and whether the courts and juries will be likely to enforce an illegal and unjust claim is not for the party himself to decide.

Nor will another court, passing his transactions, in transferring his property to another to protect himself against such demands, made in regular legal proceedings, inquire whether his apprehensions were justified or whether the suits pending against him were proper suits.'

Of course one who has consented to an unlawful act cannot, in ordinary cases, make that the basis of a claim, so as to bring one within the designation of 'creditors and others;' as e. g. in the case of a woman who, being above the age of consent, has consented to illicit intercourse, not under promise of marriage, the illicit intercourse not being a lawful consideration to support a conveyance to her. *Jackson v. Minor*, 101 Ill. 550. But this will not apply to certain exceptions to the rule against contribution between wrong-doers; as where the person seeking contribution did not know of the nature of the act done at the instance of another, for which damages have been recovered against him, or where the act was done under compulsion or duress.

or property having no 'ear-mark' to identify it, by disposing of it before knowing the facts invalidating the contract, the one in whose favor the undertaking ran would be a creditor for any balance due after deducting the loss suffered by the debtor.¹ Still one who comes with a demand which in itself appears to be voidable will not be likely to obtain the aid of the court out of the usual way, unless his showing of the need of relief is most persuasive, even when it is clear that the demand has been validated by matter subsequent; 'he who comes into equity must come with clean hands.'

§ 9. MORAL OBLIGATIONS.

There are some few cases in which it has been held that one may be a creditor in virtue of a moral obligation, where that is very strong, being perhaps of the nature and but little short of a legal obligation. In a recent Iowa case² it appeared that S had died seised of a large tract of land, which was heavily encumbered. About a third of the tract was set off to the widow, which included the subject of the suit. Nearly all of this was occupied as homestead, and should have been set out to the widow as subject to pro rata primary liability with the rest;³ but by mistake it was set out as subject only to secondary liability, thus leaving the tract which went to the heirs to be wholly exhausted first in payment of the encumbrance, a consequence which in fact followed. The widow having afterwards been advised of the law,⁴ conveyed to the heirs enough to make them good, thus putting all parties on an equality; and this conveyance was sustained against her creditors. 'No person,' it was said, 'is bound to hold for his creditors what in good morals does

¹ As to rights of rescission see vol. 1, pp. 411 et seq.

² Cottrel v. Smith, 63 Iowa, 181.

³ Trowbridge v. Sypher, 55 Iowa, 852.

⁴ As laid down in Trowbridge v. Sypher, supra, which was decided after the tract had been laid off to the widow in the manner stated in the text.

not belong to him.' The same doctrine has been held of the obligation felt and acted upon by a man to bear the expense of the support and education of his children begotten in illicit intercourse, though he may not have been legally bound to bear it.¹

To this same principle, so far as it is sound, belong possibly cases referred to at the close of the preceding chapter, of foregoing certain defences or rights of a purely personal nature, and so treating the holders of them as creditors.² But the principle is to be taken at best within the narrowest limits. It would not apply to past considerations, even though these might at the time have become the basis of a valid credit.³ Nor would it apply in favor of persons who, by intermeddling in the affairs of others and making payments of debt without authority, claim to have become creditors.⁴

§ 10. VOLUNTARY OBLIGATIONS.

Even an obligee in a voluntary sealed obligation may be a creditor.⁵ Thus in the case cited a father had given a post obit bond for securing to his daughter-in-law a certain annuity for her life; after which he made a voluntary settlement of nearly all his property, to take effect from his death,

¹ *Wait v. Day*, 4 Denio, 439. See also *Fellows v. Emperor*, 13 Barb. 97. In the first of these cases a rather broad doctrine was laid down: 'Where there is,' it was said, 'an existing obligation, either legal or moral, to pay so much money, and the payment is not made with any reference to the future, nor by way of mere gratuity, the case is not within the mischief against which the Legislature intended to provide.' The case itself should be compared with *Potter v. Gracie*, 58 Ala. 303, apparently inconsistent with it. Further see chapter 18, § 9.

² *Ante*, p. 133. See also *Spencer v. Ayrault*, 10 N. Y. 202, referred to *ante*,

p. 129; *Davis v. Lumpkin*, 57 Miss. 506; *Hubbard v. Allen*, 59 Ala. 283.

³ *Post*, chapter 18, § 7. See also *Sloan v. Torry*, 78 Mo. 623; *Luers v. Brunjes*, 34 N. J. Eq. 19 and 561; *Early v. Owens*, 68 Ala. 171, conveyance by husband in 'consideration' of the use of rents and profits of the wife's statutory separate estate, to which he was entitled by law, invalid against creditors. *Ante*, pp. 129, 155, notes.

⁴ *Means v. Hicks*, 65 Ala. 241. See *Mulholland v. McLane*, 64 Md. 455. The authority of the law to incur expense would make the party a creditor.

⁵ *Adames v. Hallett*, L. R. 6 Eq. 468.

in favor of others, and died leaving insufficient means to pay the annuity. The settlement was held void against the daughter-in-law, and that in a suit in equity.¹ Indeed this doctrine is held to apply to a like obligation *inter vivos* in a contest with creditors becoming such after breach of condition.¹ Thus a father, wealthy and unembarrassed, had given a bond to his daughter for a sum payable on her marriage, without fraudulent intent. Afterwards having become embarrassed, the father conveyed property to his daughter, who meantime had married, to be applied in discharge of the obligation of the bond; and the deed was sustained against creditors. And it was declared that equity would give no relief in such a case.² The bond was held not to have been given in consideration of marriage, and was accordingly treated as voluntary.³

¹ Giffard, V. C. (after deciding that the fact that the bond was payable after death was immaterial): 'Then does it make the slightest difference, as regards the statute of Elizabeth, that this is a voluntary debt and not a debt for value? I apprehend when you consider that statute in a suit of this description you look at what the legal rights of the parties are; and beyond all doubt in a court of law a debt of this kind would be a perfectly good debt, and the creditor would be, to all intents and purposes, a perfectly good creditor, and constituted a creditor by an act *inter vivos*. If that is his position in a court of law, I am at a loss to see why, as regards a voluntary settlement under the statute of Elizabeth, his legal rights should not be given to him in this court.' See *Fletcher v. Fletcher*, 4 Hare, 67, 74, quoted *infra*, p. 162, note.

² *Welles v. Cole*, 6 Gratt. 645.

³ A voluntary bond may, by reason of matter *ex post facto*, cease to be voluntary; as where a father gives a

voluntary bond to his son which becomes the consideration of his marriage and a marriage settlement, with the father's privity. *Payne v. Mortimer*, 1 Giff. 118, on authority of *George v. Milbanke*, 9 Ves. 190, 195. In regard to the question, which is not to be confused with this one, whether an obligation has been executed on consideration of marriage see *Welles v. Cole*, *supra*. And see *Goldicutt v. Townsend*, 28 Beav. 445, 451, that a voluntary promise, made before marriage, on the faith of which no act is done before the marriage, but after the marriage a settlement is made in accordance with the promise, does not thereby become a promise made for value; declaring *Dundas v. Dutens*, 2 Cox, 235, overruled upon that point. To the same effect, *Tweddle v. Atkinson*, 1 Best & S. 393. See as to *Dundas v. Dutens*, *Warden v. Jones*, 2 De G. & J. 76; *Lassence v. Tierney*, 1 Macn. & G. 551, distinguishing *Hammersley v. De Biel*, 12 Clark & F. 45. *Ante*, p. 184; chap. 18, § 7.

This being the law, it follows a fortiori, that if on arrears of payments due under the voluntary obligation, a new obligation for such arrears should be given, the obligee would be a creditor; for now, it is held, the new obligation is to be considered as founded upon value and is not voluntary. Thus in a case¹ before Lord Hardwicke it appeared that A had granted two annuities to B, one of them being purely voluntary, the other being in part for arrears which had accrued on the first, and in part for another consideration deemed valuable. In a contest between B and bond creditors of A, it was held that B should have priority. And the doctrine of this case was reaffirmed by Sir Wm. Grant.² It follows that B would be a creditor within the statute of 13th Elizabeth and the like statutes in this country.³

The same rule applies to voluntary covenants⁴ performable during life or afterwards,⁵ and apparently to all voluntary sealed undertakings⁶ enforceable against the maker.⁷ The

¹ *Stiles v. Attorney-Gen.* 2 Atk. 152.

² *Gilham v. Locke*, 9 Ves. 613.

³ Lord Hardwicke: 'Though the grant of the first annuity may be voluntary, taken singly, yet the recital in the second will alter the nature of it and turn it into a valuable consideration; for as there were arrears on the first, there is no doubt that this was a just and lawful debt, and the promise not to sue for these arrears was a good consideration, and from that time the first annuity ceased to be a voluntary grant.' There was no actual promise not to sue, so far as the report shows; it was only a presumption. See *Welles v. Cole*, 6 Gratt. 645, 657, 658.

⁴ *Fletcher v. Fletcher*, 4 Hare, 67; *Alexander v. Brame*, 19 Beav. 436; s. c. on appeal, 7 De G. M. & G. 525; *Lomas v. Wright*, 2 Mylne & K. 769; *May*, *Fraudulent Conveyances*, 167, 2d ed. See *Watson v. Parker*, 6 Beav. 288. 'The covenantor is liable at law,

and the court is not called upon to do any act to perfect it.' *Wigram*, V. C. in *Fletcher v. Fletcher*, supra, at p. 74. See also *Williamson v. Codrington*, 1 Ves. 511, 514.

⁵ *Alexander v. Brame*, supra.

⁶ See *Markwell v. Markwell*, 34 Beav. 12; *Cox v. Barnard*, 8 Hare, 310; *Williamson v. Codrington*, 1 Ves. 511, 514; *May*, ut supra.

⁷ If the undertaking is not enforceable against the maker, or against his representative, the donee is not a creditor. Thus in the common case of a man's giving his own promissory note to another without consideration, whether payable before or after his death, that will not make the donee a creditor either of the maker or of his estate. *Holliday v. Atkinson*, 2 Barn. & C. 501; *Dawson v. Kearton*, 3 Smale & G. 187; *Burkitt v. Ransom*, 2 Colly. 395; *Jefferys v. Jefferys*, 1 Craig. & P. 138, 141; *Holloway v.*

ground upon which the law proceeds is that a contract under seal is enforceable regardless of consideration. 'Any voluntary bond is good against an executor or administrator, unless some creditor be thereby deprived of his debt.'¹ But as the qualification indicates, the rule proceeds upon the supposition

Headington, 8 Sim. 325; Parish v. Stone, 14 Pick. 198; Loring v. Sumner, 23 Pick. 98; Carr v. Silloway, 111 Mass. 24; Warren v. Durfee, 126 Mass. 338, distinguishing Worth v. Case, 42 N. Y. 362, on the ground that in this latter case there was the valuable consideration of services not paid for; Whitaker v. Whitaker, 52 N. Y. 368; Dodge v. Pond, 23 N. Y. 69; Harris v. Clark, 3 Comst. 93; Craig v. Craig, 3 Barb. Ch. 76; Flint v. Pattee, 33 N. H. 520; Raymond v. Sellick, 10 Conn. 480; Smith v. Kittridge, 21 Vt. 238. Three judges dissented in Worth v. Case, supra. Formerly a different doctrine was laid down. See among other cases Ellis v. Nimmo, Lloyd & G. 333, and Bunn v. Winthrop, 1 Johns. Ch. 329, 336. See also Whitaker v. Whitaker, supra, at pp. 371, 372; Story, Equity, §§ 433, 987.

The donee could not claim by way of a *donatio mortis causa*, for that, like an ordinary gift, requires delivery of the property; and the delivery of one's own promissory note is no more than delivery of a chose in action. Pearson v. Pearson, 7 Johns. 26; Fink v. Fox, 18 Johns. 145; Harris v. Clark, 3 Comst. 93 (overruling Wright v. Wright, 1 Cowen, 598); Whitaker v. Whitaker, 52 N. Y. 368, 371; Carr v. Silloway, 111 Mass. 24; Flint v. Pattee, supra; Smith v. Kittridge, supra. Nor where the intestate delivered his note to a third person, to be given to the payee after his death, could the instructions of the maker be enforced as a declaration of trust. Carr v. Silloway, supra.

But it is said that where the maker of

a voluntary promissory note has paid interest upon it, and then has renewed it, the renewal note may be treated as good against legatees of the maker, though not against his creditors. Dawson v. Kearton, 3 Smale & G. 187. But see Copp v. Sawyer, 6 N. H. 386; Hill v. Buckminster, 5 Pick. 391.

And if it appear that a testator has duly made the payee of the testator's note a legatee, however inartificially, in respect of the sum payable by the note, then such payee-legatee becomes, where creditors are not concerned, entitled to payment out of the estate, — under the will, not in virtue of the note. Loring v. Sumner, 23 Pick. 98. Morton, J. at p. 102: 'A person may, by his will, revive a note barred by the Statute of Limitations, or give effect to an invalid instrument. There are several cases to this effect in Vesey's Reports. "I will that a certain note be paid," or "that a certain promise be performed," would be a valid legacy of the amount of the note or of the thing promised to be done, although the note or promise were invalid. It seems to us that the language of this will is equivalent to saying, "I will that this note of \$1000 given to Nathaniel Loring junior, be paid." And we can entertain no doubt that such would be a valid legacy. See Bibin v. Walker, Ambl. 661.' But of course this would not make the payee-legatee a 'creditor' in a contest with actual creditors of the testator.

¹ Lord Hardwicke, in Lechmere v. Carlisle, 3 P. Wms. 211, 222. See Welles v. Cole, 6 Gratt. 645, 654.

that the gift itself is not in fraud of creditors, as e. g. it would be in case of the inability of the giver to make it in justice to his creditors. If the gift could not be made without defeating creditors, it will be obnoxious to the statutes though it take the form of a sealed agreement ;¹ no presumption of consideration would be conclusive in such a case.

§ 11. LIEN CREDITORS.

Lien creditors have, as regards future conveyances, no need of the statutes against fraudulent conveyances, for all conveyances made after the lien has attached are subject to it. It is said accordingly, in England, and it is held in some of our states, that lien creditors are not within the statutes.² If however the property covered by the lien is not sufficient for the debt, then the lien creditor, in respect of the deficiency, clearly falls within the designation of 'creditors and others ;'³ and the same would be true, it seems, if the lien should be released.⁴ Nor does the rule that lien creditors are not intended mean that such a creditor will not be protected against acts like waste.⁵

§ 12. REMAINDERMEN.

Remaindermen may come within the designation of 'creditors and others ;' and this too whether the property is realty

¹ Cases last cited ; *Goldicutt v. Townsend*, 28 Beav. 445 ; *Lomas v. Wright*, 2 Mylne & K. 769 ; *Ex parte Spurrier*, Mont. 246 ; *Fairebeard v. Bowers*, Prec. Ch. 17 ; s. c. 2 Vern. 202 ; *May*, ut supra.

² *May*, *Fraudulent Conveyances*, 163, 2d ed. ; *Fordyce v. Hicks*, 76 Iowa, 41, 44 ; *Smith v. Grimes*, 43 Iowa, 356 ; *Witman's Appeal*, 45 Penn. St. 455, 463 ; *Haak's Appeal*, 100 Penn. St. 59 ; *Armington v. Rau*, ib. 165, 168 ; *Zuver v. Clark*, 104 Penn. St. 222. As to the consequences of this see chapter 16, towards the end.

³ *Harman v. Richards*, 10 Hare, 81, mortgagee in a case of deficiency proceeding against an alleged voluntary conveyance.

⁴ In Massachusetts if a mortgagee (at least of goods) attach the mortgaged property, he waives his mortgage. *Evans v. Warren*, 122 Mass. 303. That is hard to understand ; but the mortgagee would probably become a 'creditor' thereby within the meaning of 13 Eliz. c. 5.

⁵ *Witman's Appeal*, supra.

or personalty. Thus if the life tenant of land commit or wrongfully suffer waste, the remainderman will have a claim under which he can upon occasion invoke the protection of the statute against fraudulent conveyances.¹ So where personalty is invested for A for life, and thereafter for B, B comes within the meaning of the statute and is entitled to the benefit provided for by it.²

§ 13. CREDITORS BY REPRESENTATION.

There is some want of harmony among the authorities in regard to the position of a legal representative of the debtor, or of one who takes his estate for others, — administrator, executor, assignee, trustee, receiver, or the like; does such person come within the designation of 'creditors and others'? This is largely a matter of special statute; for certain purposes, as e. g. administration in bankruptcy, it is entirely a question of the bankruptcy law whether such person can be treated, and how far he can be treated, as a creditor,³ — but that is a matter of a different kind of statute altogether from the statute of Elizabeth and its counterparts in this country.

It would doubtless be held by most courts, in the absence of statute to the contrary, that an assignee or a trustee of the debtor in a conveyance for the benefit of creditors in general or particular creditors would fall within the designation of our statutes.⁴ The only statutes perhaps which

¹ See *Witman's Appeal*, 45 Penn. St. 455, 463, ante, p. 141, note.

² *Soden v. Soden*, 34 N. J. Eq. 115.

³ The law of England makes an assignee or a trustee in bankruptcy a creditor, representing the creditors for all purposes. May, *Fraudulent Conveyances*, 170, 2d ed.; 1 Geo. 4, c. 119, § 7; 32 and 33 Vict. c. 71, §§ 14 et seq.; 46 and 47 Vict. c. 52; §§ 56, 57; *Ware v. Gardner*, L. R. 7 Eq. 317; *Doe d. Grimsby v. Ball*, 11 Mees. & W. 581;

Anderson v. Maltby, 2 Ves. jr. 244, 255; *Tarleton v. Liddell*, 17 Q. B. 390.

⁴ *Holmes v. Penney*, 3 Kay & J. 90; *Root v. Potter*, 59 Mich. 498; *Harri-man v. Hart*, 55 Mich. 64; *McMasters v. Campbell*, 41 Mich. 513; *Robinson v. Bliss*, 121 Mass. 428; *Cooper v. Perdne*, 114 Ind. 207. And the assignee has the right to elect to affirm or avoid the debtor's conveyances in fraud of his creditors. *Freeland v. Freeland*, 102 Mass. 475. But this right is prob-

could prevent this are the special statutes which govern assignments in pais; and these in general concern only certain assignments of the kind.¹ In regard to receivers too, most courts would hold, it is conceived, that they fall within the designation of 'creditors and others' of the statutes against fraudulent conveyances, when not affected by other legislation.² Of administrators and executors it is perhaps more generally laid down that they occupy the double capacity of representatives of the deceased debtor and also of his creditors, and in the latter position they are within the statutes in question;³ but in many states the contrary is held.⁴

ably no more than a sound discretion. A purchaser from a debtor can maintain an action for damages against one of the debtor's creditors for interfering with the property bought, in the hands of such purchaser, after the debtor has gone into bankruptcy and an assignee has been appointed. *Pomroy v. Lyman*, 10 Allen, 468.

¹ It is held in some states that such assignee can only avoid conveyances which his assignor could avoid. *Pillsbury v. Kingon*, 31 N. J. 619; *Roan v. Winn*, 93 Mo. 508.

² *Filley v. King*, 49 Conn. 211; *Greene v. Sprague Manuf. Co.* 52 Conn. 335; *Bassett v. McKenna*, ib. 437; *Harriman v. Hart*, 55 Mich. 64 (receiver acting in place of assignee); *Dunham v. Byrnes*, 36 Minn. 106, citing *Porter v. Williams*, 9 N. Y. 142; *Wright v. Nostrand*, 94 N. Y. 31, 42; *Barker v. Dayton*, 28 Wis. 367, and other cases.

Contra formerly in New Jersey. *Higgins v. Gillesheiner*, 26 N. J. Eq. 308. Now see *Miller v. Mackenzie*, 29 N. J. Eq. 291; *Smith v. Wood*, 42 N. J. Eq. 568; *Moore v. Williamson*, 44 N. J. Eq. 496. If the assignee or trustee refuse to proceed, creditors may act. See *Filley v. King*, 49 Conn. 211. Fur-

ther as to assignees and trustees, see chapter 18, § 3; as to assignees for value see chapter 18, § 4.

³ *Bate v. Graham*, 11 N. Y. 237; *Babcock v. Booth*, 2 Hill, 181; *Frost v. Libbey*, 79 Maine, 56; *Fraser v. Passage*, 63 Mich. 551; *Smith v. Grim*, 26 Penn. St. 95; *Bouslough v. Bouslough*, 68 Penn. St. 495; *Wheeler v. Single*, 62 Wis. 380; *Forniquet v. Forstall*, 34 Miss. 87; *Martin v. Bolton*, 75 Ind. 295; *Parker v. Flagg*, 127 Mass. 28 (executor); *Putney v. Fletcher*, 148 Mass. 247; *Welsh v. Welsh*, 105 Mass. 229; *Chase v. Redding*, 13 Gray, 418; *Bassett v. McKenna*, 52 Conn. 437; *Mesmer v. Jenkins*, 61 Cal. 151; *Kelly v. Murphy*, 70 Cal. 560 (executrix). See also *Van Dyke v. Van Dyke*, 31 N. J. Eq. 176. If however the personal representative refuse to take the proper steps against a fraudulent conveyance of the intestate, a creditor may act. *Bate v. Graham*, supra; *Frost v. Libbey*, supra.

⁴ *Beebe v. Saulter*, 87 Ill. 518; *White v. Russell*, 79 Ill. 155; *Partee v. Mathews*, 53 Miss. 140; *Burton v. Farinholt*, 86 N. Car. 260; *Estes v. Howland*, 15 R. I. 127; *Zoll v. Soper*, 75 Mo. 460; *Cobb v. Norwood*, 11 Texas, 556; *Wilson v. Demander*, 71

It has even been declared that the debtor himself may disaffirm his fraudulent conveyance against a participating grantee and then recover back the property or its value for the benefit of his creditors;¹ but that is virtually holding that a man may be his own assignee, which is rather dangerous doctrine.

§ 14. FRAUD INTER ALIOS.

Creditors of one man cannot attack, as fraudulent, transfers by another from whom the former has claimed. Thus a sheriff, defending a levy of property as the property of A, cannot show that B, under whom A claims, had conveyed the same to the plaintiff C in fraud of his, B's, creditors; for that would not show any title in A or want of title in C. The fraud was an affair in which B's creditors alone were concerned; A's creditors had nothing to do with it.² But the intent of one and the same man to defraud one set of his creditors will as a rule, unless statute interferes, operate as the intent to defraud another set;³ that is a very different thing. Of course a debtor cannot object to fraud not practised upon him.⁴

§ 15. SUBSEQUENT CREDITORS.

The difference between existing and subsequent creditors has been considered at length in another place;⁵ here we have only to consider what makes one a subsequent creditor.

Texas, 608; *Boggs v. McCoy*, 15 W. Va. 344; *Crawford v. Lehr*, 20 Kans. 509.

¹ *Carll v. Emery*, 148 Mass. 32. On the facts in this case no harm could result; the danger is in the principle implied. The principle is thus stated by the court: 'When a party who has transferred property to delay or defraud creditors abandons his fraudulent purpose, apprising the other party thereof,

and seeks to reinstate himself in the possession of his property in order to pay his creditors, he may do so.'

² *Bond v. Endicott*, 149 Mass. 282. See also *Lewis v. Rice*, 61 Mich. 97, that the creditor's right of action cannot be sold.

³ Ante, p. 89.

⁴ *Harding v. Colon*, 123 Mass. 299.

⁵ Ante, pp. 89 et seq.

In all the foregoing cases of this chapter the creditor is assumed to be an existing creditor; a creditor, that is to say, of the time when the fraudulent conveyance was made. Nor is the party a subsequent creditor by reason of the fact that no judgment establishing the validity of the claim had been rendered; the claim, if enforceable, makes the claimant a creditor from its date. And though a judgment upon that claim puts an end to it by merging it into the higher obligation of the law,¹ it does not so destroy it as to make the creditor under it a creditor subsequent to any conveyance before made by the debtor; whether the creditor is an existing or a subsequent creditor is determined, generally speaking, by the original demand, not by the judgment.

Under the rule said to obtain in some states, by which it is declared that, if a conveyance by a debtor was merely voluntary, 'without intent to defraud,' as it is expressed, it will be good against subsequent creditors though it was invalid towards creditors of the time;² — under this rule it may become important in a particular case to determine whether the creditor was such at the time of the gift or only became such afterwards. Some aspects of this subject were touched upon in a preceding chapter, in considering the construction of the word 'intent.'³ We there found a distinction taken in cases of recognized authority between a mere possible liability and a debt. Cases were there referred to, such as suits for breach of promise of marriage, in which it was uncertain whether a judgment would ever be recovered at all, or what the damages might be in event of recovery; and in these it was considered that the fact that the plaintiff recovered did not make him a creditor of the time when the liability was incurred, for the purpose of avoiding a conveyance which did not necessarily hinder or defraud creditors.⁴

¹ Bigelow, *Estoppel*, 108, 5th ed.

² *Pelham v. Aldrich*, 8 Gray, 515.

³ *Ante*, pp. 103-105, 108-111.

⁴ *Ex parte Mercer*, 17 Q. B. D. 290,

C. A., *ante*, p. 109.

A Massachusetts case above cited¹ furnishes an illustration of the rule as applied in that state. It was a writ of entry to recover land conveyed by the defendants' grantor to the defendants by a deed treated as if it had been voluntary.² This conveyance had been made without any intention, in point of fact, to defraud. Shortly after the conveyance the plaintiff recovered costs against the grantor, in a suit which the grantor had ultimately failed to sustain against the present plaintiff. It was held that the plaintiff was not a creditor at the time of the conveyance, and that therefore, upon the distinction above referred to, the action could not be maintained. But that distinction in general is rather fine, and has not much to commend it,³ though as applied to a case of costs it appears to be well enough,—that is to say, the case of costs may well be treated as creating a debt subsequent to a conveyance made pending the suit.⁴

§ 16. PROMISE FOR BENEFIT OF ANOTHER'S CREDITORS.

If A make a promise for value to B, to pay B's creditors, do B's creditors thereby become creditors of A, so as to be able to take the benefit of the statutes against fraudulent conveyances upon A's making away with his property in fraud of his creditors? The answers are somewhat discordant; and generally they are only to be indirectly inferred. The authorities are perhaps more numerous in favor of the rule that a promise by A to B for the benefit of C can, ipso facto, be sued upon by C;⁵ but it is doubtful whether

¹ *Pelham v. Aldrich*, 8 Gray, 515.

² It was not voluntary in reality, though the consideration was 'perhaps not adequate.' It might well have been disposed of on the footing of valuable consideration, bona fide.

³ It appears to be due to confusion as to the term 'intent,' in the phrase 'intent to delay, hinder, or defraud' of the statute.

⁴ *Ogden v. Prentice*, 33 Barb. 160; *Stevens v. Works*, 81 Ind. 445, 449.

⁵ *Lawrence v. Fox*, 20 N. Y. 268; *Hand v. Kennedy*, 88 N. Y. 149, 154, and cases cited; *Miller v. Florer*, 15 Ohio St. 148, 151; *Devol v. McIntosh*, 23 Ind. 529; *Cross v. Truesdale*, 28 Ind. 44; *Scott v. Gill*, 19 Iowa, 187; *Rice v. Savery*, 22 Iowa, 470; *Fleischer v. Dignon*, 53 Iowa, 288; *Rogers v.*

the weight of authority is with the numerical superiority.¹ The subject is affected by statute in some states, to the benefit of creditors ;² though that probably was not intended.

Where the rule prevails that one for whose benefit a contract is made can sue upon it, such person is a creditor for the purposes of the statutes against fraudulent conveyances ;³ and where this rule in itself is denied, that would be true of those exceptions in which it is admitted that the beneficiary, though not a party to the contract and not a promisee from the promisor, can sue.⁴ One of the exceptions consists of cases in which the defendant has money which in equity and good conscience belongs to the plaintiff, 'as where one person receives from another money or property as a fund from which

Gosnell, 58 Mo. 589 ; Allen v. Thomas, 8 Met. (Ky.) 198 ; Wiggins v. McDonald, 18 Cal. 126 ; Carnegie v. Morrison, 2 Met. 381, 396 ; Brewer v. Dyer, 7 Cush. 337, 340. As to the last two cases see Exchange Bank v. Rice, 107 Mass. 37, 41.

¹ Tweddle v. Atkinson, 1 B. & S. 393 ; Mellen v. Whipple, 1 Gray, 317 ; Millard v. Baldwin, 3 Gray, 484 ; Field v. Crawford, 6 Gray, 116 ; Dow v. Clark, 7 Gray, 198 ; Colburn v. Phillips, 13 Gray, 64 ; Flint v. Pierce, 99 Mass. 68 ; Exchange Bank v. Rice, 107 Mass. 37.

In Tweddle v. Atkinson, supra, Wightman, J. said : 'Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration. The strongest of those cases is that cited in Bourne v. Mason, 1 Ventr. 6, in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her

father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.' One of the early cases of the kind was Dutton v. Poole, 2 Lev. 210 ; s. c. ib. 318 ; affirmed in Exch. Ch. T. Raym. 302. But as to that case see Tweddle v. Atkinson, at p. 396, Wightman, J., and p. 399, Blackburn, J.

² See e. g. Miller v. Florer, 15 Ohio St. 148, the common statute giving the right of action to the real party in interest. But that is not the necessary effect of such a statute ; the object usually is to give assignees the right to sue in their own names.

³ Fleischer v. Dignon, 53 Iowa, 288.

⁴ Gray, J. in Exchange Bank v. Rice, 107 Mass. 37, 42. 'That class of cases . . . includes Carnegie v. Morrison [2 Met. 381], and most of the earlier cases in this commonwealth, as well as the later cases of Frost v. Gage, 1 Allen, 262, and Putnam v. Field, 103 Mass. 556.'

certain creditors of the depositor are to be paid, and promises either expressly or by implication from his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors.'¹

Another exception, formerly but not now admitted, included cases in which a man has made a promise for the benefit of his wife or child.² A third exception was made by a case³ in which the defendant had made a written promise to the lessee of a shop to take his lease (under seal) and pay the rent to the lessor according to its terms, entered into possession of the shop with the lessor's knowledge, paid rent to him, and then, before the expiration of the lease, left the shop, and was held liable to an action by the lessor for the rent subsequently accruing. But doubt has been thrown upon this case.⁴ If it appear however, whether directly or by fair implication, that the defendant has promised the plaintiff, as by promising the plaintiff's agent knowing or not knowing him to be such, then clearly the plaintiff becomes his creditor, and comes within the protection of the statutes against fraudulent conveyances.⁵

§ 17. UNDER SPECIAL STATUTES.

In some of the special statutes against fraudulent conveyances, such as those concerning the sale or assignment of goods without delivery of possession, there will be found a particular definition of the term 'creditors,' a definition i. e. for the purposes of that statute. Thus in section 6th of the New

¹ *Exchange Bank v. Rice*, supra.

² *Felton v. Dickinson*, 10 Mass. 287, overruled in *Exchange Bank v. Rice*, supra. And see *Tweddle v. Atkinson*, 1 Best & S. 393; *Jefferys v. Jefferys*, 1 Craig & P. 138; *Holloway v. Headington*, 8 Sim. 325. These cases overrule *Ellis v. Nimmo*, Lloyd & G. 348, and earlier dicta and decisions.

³ *Brewer v. Dyer*, 7 Cush. 337.

⁴ *Exchange Bank v. Rice*, supra.

⁵ *Ib.*; *Lilly v. Hays*, 5 Ad. & E. 548; s. c. 1 Nev. & P. 26; *Walker v. Rostron*, 9 Mees. & W. 411; *Sims v. Bond*, 5 Barn. & Ad. 389; s. c. 2 Nev. & M. 608; *Huntington v. Knox*, 7 Cush. 371; *Barry v. Page*, 10 Gray, 398; *Hunter v. Giddings*, 97 Mass. 41; *Ford v. Williams*, 21 How. 287. See *Rice v. Savery*, 22 Iowa, 470.

York statute on the subject before mentioned it is provided that the term 'creditors' shall be construed to include all persons who shall be creditors of the vendor or assignor at any time whilst the property shall remain in his possession or under his control.¹ And that is a common provision.² Creditors by simple contract are protected as well as judgment creditors; but in ordinary cases a simple contract creditor is not as such in a position to assert his rights under the statute. He should have a judgment and a lien;³ the statute is not peculiar in that respect.

§ 18. SATISFACTION OF JUDGMENT.

A creditor by judgment remains a creditor though the judgment is satisfied of record, if the satisfaction was entered by reason of a void execution and sale of property. And the debtor brings himself within the condemnation of the law by a subsequent conveyance of such property (or of any other) made with intent to defeat the further prosecution of the claim. It does not matter that no suit or proceeding of any sort may be maintainable upon the judgment.⁴

¹ Ante, p. 36.

² Ante, p. 37. The statutes of Virginia and of West Virginia contain the following: 'The words "creditors" and "purchasers," where used in any previous section of this chapter, shall not be restricted to the protection of creditors of and purchasers from the grantor, but shall extend to and embrace all creditors and purchasers who, but for the deed or writing, would have had title to the property conveyed, or a right to subject it to their debts.' Va. Code, 1873, c. 114, § 11; W. Va. Code, c. 74, § 11. See *Henderson v. Hepburn*, 2 Call, 198; *Land v. Jeffries*, 5 Rand. 211; *Thomas v. Gaines*, 1 Gratt. 347; *McCandlish v. Keen*, 13 Gratt. 616; *Dabney v. Kennedy*, 7 Gratt. 317.

³ *Southard v. Benner*, 72 N. Y. 424, Allen, J.; *Geery v. Geery*, 63 N. Y. 256; *Frisbey v. Thayer*, 25 Wend. 396.

⁴ *Plimpton v. Goodell*, 143 Mass. 118. The learned judge who delivered the opinion of the court, Mr. Justice Field, says on p. 367, that 'if the defendant knew or was advised that the levy was void, she could actually intend to defeat, delay, or defraud the plaintiff in making a conveyance of her property, although his judgment remained satisfied of record.' It was a fact that the defendant did know that the levy was void; but it is apprehended that the decision must have been the same whatever she knew or supposed, where there was an intent to defraud.

CHAPTER VII.

INTENT: POSITIVE ELEMENTS: VOLUNTARY
ALIENATIONS.

THE great question now calling for consideration relates to the word 'intent' in the expression 'intent to delay, hinder, or defraud.' We have already reached a negative conclusion in the chapter on the Construction of the Statute, to wit, that the statute of 13th Elizabeth does not ordinarily call for proof by the creditor of any intention of wrongdoing, in point of fact, on the part of the debtor in making the alienation;¹ and this requires the affirmative conclusion, to which we have referred, that the standard of guilt or wrongfulness in the transaction must in general be external.² Some general features of this external standard have also been pointed out. It remains to ascertain in detail what is required by law to satisfy the 'intent' of the statute.³

¹ Corporations may have intent to defraud. *Curtis v. Leavitt*, 15 N. Y. 9; s. c. 17 Barb. 309; *Smith v. Morse*, 2 Cal. 524.

² For the cases in which this is not true see chapter 15, § 2. But both sections of that chapter should be read together.

³ The fact that the words 'intent to defraud' are generally technical words of the law, and so not safely to be taken in their popular sense, has sometimes been lost sight of, where the act of the debtor has been done, in point of fact, with good motives; and courts have thought themselves, in granting the

claims of creditors, compelled simply to say that the creditor was not bound by his debtor's act. Thus in a Pennsylvania case, *Peters v. Light*, 76 Penn. St. 289, an assignment by an insolvent debtor of the business of manufacturing and selling iron contained a clause providing that the assigned should carry on the business 'so long as the creditors may determine to be to their interest to do so.' The clause was declared clearly invalid against non-assenting creditors; but it was said that it did not indicate any fraudulent intent, though it 'bound no creditor who did not assent.' See also the well-decided case of *Myers v.*

The subjects to be considered in examining the question here proposed have been referred to in a broad way at the end of the chapter on the Construction of the Statute. Among them a general class of voluntary conveyances calls for consideration, which for convenience may be taken in hand first of all.

Such conveyances, when they are not made with any personal intention to defraud and yet are invalid against creditors, have sometimes been deemed to fall just without the language of the statute, so as to require the transaction to be treated as one of constructive fraud; but that seems to be a clear mistake. Interpretation alone¹ works out the fact that the statute directly embraces those voluntary conveyances, and puts them on the same footing with others in which there may be no personal intention to defraud, to wit, as fraudulent in contemplation of law.² For the statute may be thus paraphrased:—

Collins, 16 Ohio, 547. If it were not important to emphasize the fact that 'intent' in the statute, and the word 'fraud' as well, are technical terms, the matter might be passed by with the remark that the result is the same.

¹ It is not uncommon to confuse construction with interpretation. Construction gives a character to an act, for some limited purposes, which it has not of itself. Thus certain conduct subsequent gives to an act at first proper some of the characteristics of fraud; and so the act comes to be treated as constructively fraudulent. Vol. 1, *Intro.* xii, and p. 384; also *post*, chapter 15. Interpretation on the other hand is only translation.

But it is conceived that, while the grantor of an invalid voluntary alienation, being within the statute, is therefore guilty of 'intent to delay, hinder, or defraud,' he is so guilty by *prima facie* presumption only. That would

satisfy the statute; and as much as that is proper, because the debtor may well be presumed, *prima facie*, to know his own pecuniary condition. But he may have had reason to suppose, and he may have accordingly supposed, that his condition would justify the gift; and in such a case the transaction, while still invalid, would properly be considered as amounting only to constructive intent to defraud. Vol. 1, pp. 11, 12, 385, 403.

On the part of the taker too (and giver and taker, it must be remembered, may stand on very different footings for some purposes) there may be no fraud; there may be nothing more than the fact that he is a volunteer, entirely innocent of wrongdoing and of notice of wrongdoing. And important consequences flow from the fact, as will be seen in chapter 16, § 1, and in chapter 19, § 1.

² There is some difference in the

All alienations by debtors made with intent to delay, hinder, or defraud their creditors and others are void against such persons; but (this is the saving of the statute) alienations by debtors, made bona fide and for *value*, are lawful. This is the essence of the statute of 13th Elizabeth; and it shows that the statute must embrace voluntary alienations invalid against creditors, for the saving does not declare that alienations made bona fide are lawful, but only alienations made bona fide and also for value. That is to say, interpreting declaratory part and saving of the statute together, which is no more than a reading of the statute, the following or something like it, becomes part of the legislation: Voluntary alienations may (in proper cases) be treated as having been made with intent to delay, hinder, and defraud creditors, though they may have been made in good faith.¹

effect of a voluntary conveyance and a conveyance for value, successfully impeached by creditors. A volunteer does not take with notice necessarily, and may be entitled to the benefit of improvements; secus ordinarily of a purchaser for value with notice. See chapter 16, § 1.

¹ This is the true view on authority, as well. In *Jenkyn v. Vaughan*, 3 Drew. 419, 424, Vice Chancellor Kindersley, one of the ablest equity judges of recent times, said: 'Now the statute of 13th Eliz., cap. 5 . . . avoids deeds which are made with intent to defraud or delay creditors. The instrument must be made with intent to defraud creditors. Now no doubt an instrument may be executed for the purpose of defrauding subsequent creditors [the matter in question]; and with regard to creditors being so at the time, it is established that it is not necessary to show, from anything actually said or done by the party, that he had the express design by the deed

to defeat creditors; but if he includes in it property to such an amount that, having regard to the state of his property and to the amount of his liabilities, its effect might probably be to delay or defeat creditors; if the court is satisfied of that, the deed is *within the meaning of the statute*.' This language is quoted with approval by Lord Ashbourne, C. in *In re Moroney*, 21 L. R. Ir. 27, 46. See also *French v. French*, 6 De G. M. & G. 95; *Crossley v. Elworthy*, L. R. 12 Eq. 158; *Freeman v. Pope*, L. R. 5 Ch. 538, 541, where it is said, 'the case is within the statute.' See however *Clayton v. Brown*, 30 Ga. 490, 495.

It should not be supposed to follow that voluntary alienations are presumptively unlawful; but the Legislature of New York, after the decision of Chancellor Kent in *Reade v. Livingston*, 3 Johns. Ch. 481, ante, p. 99, found it necessary to add to the statutes a clause to that effect. Ante, p. 35, § 4. And the example of New York has been widely followed. But the burden is

But though a voluntary alienation *bona fide* made¹ by a debtor may be within the very meaning of the statute, the statute does not declare, either in terms or in natural meaning, that a voluntary alienation is invalid against creditors. Something more than want of value is required; and that something more, according to received principles, must constitute, or be the legal equivalent of, the 'intent' to defeat creditors. Nor does the statute tell us what that 'intent' itself means. Here is the place for construction as distinguished from interpretation; and construction has laid down the following proposition: A voluntary alienation by or on behalf of a debtor, which has the direct effect to delay, hinder, or defraud his creditors, is within the statute; in contemplation of law such alienation is made with 'intent' to defeat the debtor's creditors. This is the proposition calling for examination as expressing the chief idea of that part of the statute which goes before the saving. That proposition requires us to consider sooner or later what makes an alienation voluntary, and also what are the circumstances under which a voluntary alienation has the effect to defeat creditors.

It is impossible to define the term 'voluntary alienation' or conveyance without the use of some term which itself requires particular explanation. The most succinct and on the whole the most satisfactory definition makes use of the term 'valuable consideration.'² That term, plain enough in ap-

upon the party attacking the conveyance to show that it is fraudulent; and though this is to be shown in the legal sense only, it is not shown in that sense by proof that it is voluntary though made by a debtor. The alienation must be proved to be wrongful; it must be opposed to what we have called the common conscience. *Anta*, pp. 4, 10, 16. But the view of Chancellor Kent

in *Reade v. Livingston* has been adopted even by statute in some states. *Anta*, pp. 88, 83, 100; *post*, p. 180.

Of course where there is in fact an intention to delay or defraud creditors a voluntary alienation will be invalid against creditors.

² The original meaning of the term 'voluntary' in this connection very likely was the etymological one, of an

pearance, is in reality highly technical and also very complex. It appears in the name of 'good consideration' in the proviso of the statute of Elizabeth,¹ and must of necessity be examined after we have completed the declaratory part of the statute, unless we treat the declaratory part and the proviso together, a course which would be unnatural and lead to no little inconvenience.

We must then be content for the present with a definition which employs a term not self-explanatory, leaving that term for examination later and by itself.² In a word we must, after the definition, *assume* for the present that we are dealing with a voluntary alienation. With this explanation we proceed to observe that a conveyance is voluntary when it is not founded upon what the law calls a valuable consideration. An alienation of property may be founded upon a 'good' or a 'meritorious' consideration, and that will be enough to make it valid between the parties;³ but if that is all, it is still voluntary. The term in question has often, and usefully, received a fuller definition; 'valuable' is said

alienation proceeding solely of the *will* of the alienor, without other motive; and that meaning is actually given to it at the present time in the English law of bankruptcy touching preference. A preference under that law is 'voluntary' and invalid if solely at the 'will' of the debtor. But that is not the whole meaning of the term in the administration of the statute of Elizabeth and the corresponding American statutes, or the American insolvency and bankruptcy laws. See chapter 18.

¹ 'Good,' in the proviso, has always been interpreted to mean 'valuable.' *Twyne's Case*, 3 Coke, 80; *Copis v. Middleton*, 2 Madd. 410.

² See chapter 18.

³ This appears to be wholly a forced notion, fixed in the modern English law upon the adoption of the doctrine of

consideration. The idea finally took root that there ought to be a consideration for every transaction involving agreement falling within the cognizance of the law; and so the old lawyers began to say that in agreements by way of gift (for a completed gift is as much a case of agreement as is a sale) there was a 'good' or in case of blood or marriage a 'meritorious' consideration. So these terms, being accepted, became fixed. It would have saved the student trouble in the beginning of his studies if it had been declared that consideration having no inherently necessary connection with agreements, had nothing to do with gifts. In the end the student finds out that the unknown quantity has in reality no significance, and is only a term of conformity.

to mean a 'benefit' to the grantor *or* a 'detriment' to the grantee.¹ But these terms are equally technical, and can only be understood after special examination. We shall often use the word 'gift' as the rough equivalent of voluntary alienation; but the word must not be taken as definition.

We proceed now to consider the circumstances under which a voluntary alienation has the effect to defeat creditors.

¹ 'The definition of a voluntary conveyance,' says a learned judge, 'must be steadily kept in view. It is a conveyance founded merely and exclusively on a good, as distinguished from a valuable, consideration, — on motives of generosity and affection. . . . If the donor receives a benefit, or the donee suffers detriment, as the consideration of the conveyance, the consideration is valuable, not good merely. However inadequate such consideration may be, however trivial the benefit to the one or the damage to the other, the conveyance is not voluntary.' Brickell, C. J. in *Bibb v. Freeman*, 59 Ala. 612.

CHAPTER VIII.

INTENT TO DEFRAUD: VOLUNTARY ALIENATIONS:
CONDITION OF THE DEBTOR.

§ 1. THE PRESENT INQUIRY.

THE inquiry now, as indicated at the close of the last chapter, is in regard to the circumstances under which a voluntary alienation by a debtor has the necessary effect to delay or defeat his creditors; an inquiry which, as we have already seen, turns, not upon the debtor's state of mind, but, according to the more general rule, upon the state of his property,¹ assuming that there was no actual intent to defraud.² The present question then is, What pecuniary condition of the debtor will, and what will not, justify him, towards his creditors, in making a particular gift? When is the debtor 'in a situation to make the gift in justice to his creditors, i. e. without delaying them in the enforcement of their rights' ?³

¹ *Cole v. Tyler*, 65 N. Y. 73; *Bittenger v. Kasten*, 111 Ill. 260; *Moritz v. Hoffman*, 35 Ill. 553; *Power v. Alston*, 93 Ill. 587; *Mathews v. Jordan*, 88 Ill. 602; *Fanning v. Russell*, 94 Ill. 386; *Merrell v. Johnson*, 96 Ill. 224; *Wheeler v. Wheeler*, 43 Conn. 503; *Brown v. Spiney*, 53 Ga. 155; *Baker v. Lyman*, 53 Ga. 339; *Lord v. Hough*, 43 Cal. 581 (gift of 'community' property). At the time or in consequence of the alienation of course. *Rose v. Colter*, 76 Ind. 590. See *infra*, pp. 180 et seq.

² In that case the gift would be within the statute, regardless of the

pecuniary condition of the donor. See *Lord v. Hough*, 43 Cal. 581; *Hagar v. Schindler*, 29 Cal. 47; *Emerson v. Bemis*, 69 Ill. 537 ('where there is no actual fraudulent intent' the gift may be good); *Bittenger v. Kasten*, 111 Ill. 260 (quoting the last case); *Durand v. Weightman*, 108 Ill. 489.

³ *Ante*, p. 82. In *Cole v. Tyler*, *supra*, the court says: 'It is not necessary that there should be any fraudulent intent. . . . The evidence showed that C was indebted when he made his conveyance . . . to an amount largely beyond his remaining property, or in other words, after deducting the amount con-

§ 2. WHAT MAKES A CASE FOR THE CREDITOR.

One partial answer to this question has already been touched upon. The question which the authorities down to the present century and somewhat later had not definitely answered, whether it was enough for the creditor, in attacking the gift, to show simply that the giver was indebted when he made the gift, has long since become settled; in some states, either by statute or on grounds of public policy, in the affirmative, as an absolute presumption, in accordance with the opinion of Chancellor Kent;¹ in most of the states, in the negative, again sometimes by statute, sometimes on grounds of policy, indebtedness not being allowed to make even a *prima facie* presumption of fraud.²

veyed he had by no means sufficient property to pay the plaintiff.' An assignment in trust for creditors is, or may be, voluntary under this rule, and may equally be a fraud upon creditors regardless of motive. *Griffin v. Marquardt*, 17 N. Y. 28; *Callomb v. Caldwell*, 16 N. Y. 484; *Lee Bank v. Talcott*, 19 N. Y. 146.

The New York statute of Uses and Trusts, which deals specially with such cases, differs from the general statutes against fraudulent conveyances in that it allows the impeachment of a voluntary conveyance for mere want of a valuable consideration moving from the grantee, as being *prima facie*, but not conclusively fraudulent; the general statute (*ante*, p. 35) declaring that a conveyance shall not be adjudged fraudulent 'solely on the ground that it was not founded on a valuable consideration.' *Dunlap v. Hawkins*, 59 N. Y. 342; *infra*, p. 185.

¹ *Reade v. Livingston*, 3 Johns. Ch. 481; *Seals v. Robinson*, 75 Ala. 368; *Early v. Owens*, 68 Ala. 171; *Anderson v. Anderson*, 64 Ala. 403; *Bibb v. Free-*

man, 59 Ala. 612; *City Bank v. Hamilton*, 34 N. J. Eq. 158; *Claffin v. Mess*, 30 N. J. Eq. 211; *Hurley v. Taylor*, 78 Mo. 238; *Hatcher v. Crews*, 78 Va. 460; *Fink v. Denny*, 75 Va. 668; *Hunters v. Waite*, 3 Gratt. 26; *Hutchinson v. Kelly*, 1 Rob. (Va.) 128; *Rogers v. Verlander*, 30 W. Va. 619, 649; *Lockhard v. Beckley*, 10 W. Va. 87, 100, 101; *Fellows v. Smith*, 40 Mich. 689. In some states the existence of debts makes the voluntary conveyance *prima facie* fraudulent. See *Cowen v. Alsop*, 51 Miss. 158; *Hunters v. Waite*, *supra*; *Rogers v. Verlander*, *supra*.

² *Jackson v. Badger*, 109 N. Y. 632; *Holden v. Burnham*, 63 N. Y. 74; *Pomeroy v. Bailey*, 43 N. H. 118; *Day v. Cooley*, 118 Mass. 524; *Winchester v. Charter*, 12 Allen, 606; s. c. 102 Mass. 272; *Thacher v. Phinney*, 7 Allen, 146, 150; *Salmon v. Bennett*, 1 Conn. 525; *French v. French*, 67 Maine, 186 (the first headnote in this case is wrong); *Wilson v. Howser*, 12 Penn. St. 109; *Andrews v. Flanagan*, 94 Ind. 383; *Hogan v. Robinson*, *ib.* 138; *Pennington v. Flock*, 93 Ind.

But while Chancellor Kent thought that the gift should be treated as in fraud of creditors regardless of the condition of the debtor, he was of opinion that a distinction should be taken between the claims of existing and of future creditors of the giver. Towards existing creditors it was enough to show debts; towards future creditors debts sufficient to raise an inference of a fraudulent intent should be shown; or, as the rule is often stated, towards existing creditors it is enough to show that the debtor has made a voluntary conveyance; towards subsequent creditors 'fraud in fact' must be shown.¹ The one case is put upon the footing of public policy, the other upon the footing of the statute.² The whole distinction has had and has some following; in all those states in which the rule in regard to existing creditors obtains, it is believed that the rule in regard to subsequent creditors also obtains.

The second part of Chancellor Kent's rule also is by no means generally accepted, if 'fraud in fact' is to be taken in the sense of 'fraud as a matter of fact,' i. e. fraud in actual personal intention. It is not necessary for the purposes of a subsequent creditor that he should prove a personal intention on the part of the debtor to defraud or to delay anybody; enough that the facts which he proves would, towards existing creditors, establish a fraudulent intent as matter of law. And that may be done, by the better rule, by showing that the debtor was not in a proper condition, towards his existing creditors, to make the gift.³ When such a case as this is

378; *Jennings v. Howard*, 80 Ind. 214; *Spaulding v. Blythe*, 73 Ind. 93; *Morrill v. Kilmer*, 113 Ill. 818; *Bittenger v. Kasten*, 111 Ill. 260; *Merrell v. Johnson*, 96 Ill. 224; *Patrick v. Patrick*, 87 Ill. 555; *Moritz v. Hoffman*, 35 Ill. 553; *Taylor v. Eastman*, 92 N. Car. 601; *Worthy v. Brady*, 61 N. Car. 265; *Warren v. Moody*, 122 U. S. 132; *Adams v. Collier*, ib. 382; *Townsend v. Westacott*, 2 Beav. 340, 344; *Kent v. Riley*, L. R. 14 Eq. 321.

¹ *Reade v. Livingston*, supra; *Claffin v. Mess*, 30 N. J. Eq. 211; *Hagerman v. Buchanan*, 45 N. J. Eq. 677; *Gordon v. McElwain*, 82 Ala. 247; *Walsh v. Byrnes*, 39 Minn. 527; *Day v. Cooley*, 118 Mass. 524; *Cole v. Terrell*, 71 Texas, 549. See *Lewis v. Simon*, 72 Texas, 470.

² *Hurley v. Taylor*, 78 Mo. 238; *Claffin v. Mess*, 30 N. J. Eq. 211.

³ *Day v. Cooley*, 118 Mass. 524; *Winchester v. Charter*, 12 Allen, 606, 609; *Claffin v. Mess*, 30 N. J. Eq. 211;

spoken of as 'fraud in fact,' as it has been¹ the term is to be taken in a special, and not in its ordinary, sense. It then looks to cases in which the intent to defraud is found as a fact only as the intent is the intent of the average man; the average man would intend to defraud, in such a case.

Speaking then with reference to the law of most of the states, on the assumption that the term 'fraud in fact,' when used, includes cases of voluntary conveyances by debtors not in a condition towards their existing creditors to make them, it may be laid down as the more general rule that, whether the claim under consideration arose before or after the conveyance assailed, the question to be considered is the same. That question is, Were the existing debts such as to make it unjust to creditors of the time to withdraw the property in question? If they were, the gift is fraudulent not only towards the existing creditors but also towards those creditors whose claims arose before the existing creditors were all paid off.² If the debts were not such as to affect the existing creditors, subsequent creditors clearly cannot complain of the gift.³

ante, pp. 101, 104. See Washburn v. Hammond, 24 N. E. R. 33, 34. Contra in some states. Ante, p. 102.

¹ Claflin v. Mess, supra; ante, p. 105, note.

² Day v. Cooley, 118 Mass. 524; Winchester v. Charter, 12 Allen, 606, 609 (see s. c. 102 Mass. 272); Redfield v. Buck, 85 Conn. 328; Claflin v. Mess, 30 N. J. Eq. 211; Robinson v. Clark, 76 Maine, 498; Cole v. Tyler, 65 N. Y. 73; McCanless v. Flinchum, 89 N. Car. 378; Hunters v. White, 3 Gratt. 26; White v. McPheeters, 75 Mo. 286; Tupper v. Thompson, 26 Minn. 385; Henry v. Hinman, 25 Minn. 199; Williams v. Osborne, 95 Ind. 347; Andrews v. Flanagan, 94 Ind. 383; Wright v. Nipple, 92 Ind. 310; Eve v. Louis, 91 Ind. 457; Barhydt v. Perry, 57 Iowa, 416; Watson v. Riskamira, 45 Iowa, 231;

Morrill v. Kilner, 113 Ill. 318; Bongard v. Block, 81 Ill. 186; Fellows v. Smith, 40 Mich. 689.

³ Faloon v. McIntyre, 118 Ill. 292; Higgins v. White, ib. 619. Of course then evidence of the pecuniary circumstances of the debtor is admissible. Jennings v. Howard, 80 Ind. 214.

A man who is solvent may make a parol gift or promise to give lands; and if the grantee enter and make improvements, the gift will be good against the grantor, and of course against his creditors. Dozier v. Matson, 94 Mo. 328; Dougherty v. Harsel, 91 Mo. 161. The transaction was treated as founded upon valuable consideration in these cases. That was, it seems, wrong. See chapter 18, § 1. The gift was good because the grantor was not made unable to pay his debts.

It is not enough, even for a *prima facie* case, if we accept the more general doctrine, to show that the grantor, being in debt, made a voluntary alienation.¹ Indeed to show that a man was deeply in debt when he made a gift is in itself nothing, for he may still have, after the gift, ample means out of which payment may be enforced. The evidence should go so far as to show that the grantor was either 'alieno ære prægravatus,' weighed down, embarrassed with debt,² or in debt to such an extent that to withdraw the property in question from the claims of creditors would defeat or delay them.³

Nay, it has been suggested that there may be a question of

¹ *Winchester v. Charter*, 12 Allen, 606, 609; s. c. 102 Mass. 272; *Thacher v. Phinney*, 7 Allen, 146, 150; *Lerow v. Wilmarth*, 9 Allen, 382; *Beal v. Warren*, 2 Gray, 447; *Green v. Tanner*, 8 Met. 411; *Patrick v. Patrick*, 87 Ill. 555; *Jackson v. Badger*, 109 N. Y. 632; *Holden v. Burnham*, 63 N. Y. 74; *Townsend v. Westacott*, 2 Beav. 340, 344.

Contra too by statute in some states. *Buchanan v. Buchanan*, 72 Ala. 55; *Gordon v. Tweedy*, 71 Ala. 292; *Hamilton v. Blackell*, 60 Ala. 545; *Hubbard v. Allen*, 59 Ala. 283; *City National Bank v. Hamilton*, 34 N. J. Eq. 158; *Cowen v. Alsop*, 51 Miss. 158. See also *Gale v. Williamson*, 8 Mees. & W. 405, 410, Rolfe, B.; ante, p. 38.

² *Shears v. Rogers*, 3 Barn. & Ad. 362; *Gale v. Williamson*, 8 Mees. & W. 405; *Lerow v. Wilmarth*, supra; *Draper v. Buggee*, 133 Mass. 258; *Cock v. Oakley*, 50 Miss. 628; *Patterson v. Kinney*, 97 Ill. 41; *Lionberger v. Baker*, 88 Mo. 447. See *Stivers v. Horne*, 62 Mo. 473.

³ *Thacher v. Phinney*, 7 Allen, 146; *Beal v. Warren*, 2 Gray, 447, 454; *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 499. (But in Virginia there would be a presumption against the debtor in

any case, in favor of existing creditors. Ante, p. 38.) It is said in *Parkman v. Welch*, 19 Pick. 231, 236, and it has been said in other cases, that it is enough to show that the debtor was 'deeply in debt' when he made the gift; but here 'deeply in debt' means in debt to such an extent that to withdraw the property in question from creditors by a gift would defeat or delay them. *Thacher v. Phinney*, supra, at p. 150; *Winchester v. Charter*, 102 Mass. 272. See *Cook v. Holbrook*, 146 Mass. 66. Beyond that the proposition is not true, according to the better authorities.

It does not help the matter in any of these cases, as the cases in this and in the preceding note show, that the conveyance was founded upon a 'meritorious' consideration.

Further in regard to debtors weighed down with debt, *Hinde v. Longworth*, 11 Wheat. 199; *Norton v. Norton*, 5 Cush. 524; *Cole v. Tyler*, 65 N. Y. 73; *Carpenter v. Roe*, 10 N. Y. 227; *Verplank v. Sterry*, 12 Johns. 536, 559; *Seward v. Jackson*, 8 Cowen, 406, 423, 434, 438; *Van Bibber v. Mathis*, 52 Texas, 406; *Kerr v. Hutchins*, 46 Texas, 384; *Cock v. Oakley*, 50 Miss. 628.

fact in regard to fraud even where the debtor had not sufficient or had but barely sufficient property to pay his debts when he made the gift.¹ Thus in a Massachusetts case² in which an assignee in insolvency sought to recover land voluntarily conveyed by the debtor to his wife, an instruction to the jury to the following effect was upheld: Whether a voluntary conveyance is fraudulent or not is a question of fact, to be determined upon all the circumstances in regard to making the same, especially upon the condition of the grantor in regard to property and the amount of debts then due by him;³ a voluntary conveyance would not be fraudulent if it was proved to have been made by a person substantially free from debt and possessed of a large amount of property, with no purpose to delay creditors; but such a conveyance by a person deeply in debt, whose property was inadequate or barely sufficient for the payment of his debts, would furnish strong presumptive evidence, which if unexplained would show the conveyance to be invalid against creditors.⁴

It would be difficult however to show facts, other than the consent of the creditor,⁵ or something equivalent thereto, which could justify a considerable gift by a debtor whose property at the time or after the gift was 'inadequate or barely sufficient for the payment of his debts.' It is clear that the mere fact that the debtor had no actual intention in mind to delay his creditors would not be received for the purpose of establishing the gift; the rule requires that the apparent intent should be 'explained,' and that means that facts, not motives, should be shown to justify it.⁶

¹ Winchester v. Charter, 102 Mass. 272.

² Ib.

³ See Draper v. Buggee, 133 Mass. 258.

⁴ Cook v. Holbrook, 146 Mass. 66, 67.

⁵ See Perkins v. Webster, 2 Cush. 480, 484.

⁶ Indeed it is correct, notwithstanding some expressions in the books to the contrary, to say that a voluntary conveyance by an insolvent debtor, or by a debtor who is made insolvent by the conveyance, is per se fraudulent. Hunters v. White, 3 Gratt. 26; McCannless v. Flinchum, 89 N. Car. 373. This is of course consistent with ad-

Under the much-copied Statute of Uses and Trusts of New York,¹ touching the acquisition of property by one person the title to which however is taken in the name of another, a voluntary alienation may be impeached 'solely for the want of a valuable consideration moving from the grantee ;'² while the language of the general statute of New York and other states, against fraudulent conveyances, is just the contrary.³ But the presumption of fraud in a case under the former statute is still only *prima facie*. A creditor cannot, under that statute any more than under the statute of Elizabeth, successfully impeach a conveyance founded, e. g. on natural love and affection and free from the imputation of any intention to defraud, when the debtor has, independently of the prop-

mitting evidence of consent, condonation, waiver, or the like. The law is well stated by Mr. Justice Baldwin in *Hunters v. White*, *supra*. 'If,' said the learned judge, 'a man in insolvent circumstances conveys away his property to strangers, or settles it upon his wife and children, the law concludes the design to be fraudulent against his creditors, and all evidence to the contrary is idle or delusive ; and so if he renders himself insolvent by a voluntary conveyance, however meritorious in itself merely. It is vain to speculate upon his motives or adduce evidence of an honest purpose. . . . Apologies and excuses may be found to absolve him from all moral turpitude, but to these the law cannot listen.'

And the same may be said too of cases in which the voluntary conveyance raises only a *prima facie* presumption ; as the text states. Thus in *Cole v. Tyler*, 65 N. Y. 78, the court says of such a case : 'This presumption is not to be overthrown by mere evidence of good intent or generous impulse. It must be overcome by circumstances

showing on their face that there could have been no bad intent, such as that the gift was a reasonable provision and that the debtor still retained sufficient means to pay his debts.' See also *Hunters v. White*, *supra* ; *Winchester v. Charter*, 12 Allen, 606.

¹ 1 Rev. Sts. 728, § 52. See *Underwood v. Sutcliff*, 77 N. Y. 58 ; *Ocean Bank v. Olcott*, 46 N. Y. 12 ; *Molm v. Barton*, 27 Minn. 530 ; *Rogers v. McCauley*, 22 Minn. 384 ; *Fairbairn v. Middlemiss*, 47 Mich. 372 ; *Cranson v. Smith*, *ib.* 189.

² *Dunlap v. Hawkins*, 59 N. Y. 342, Allen, J. 'Every such conveyance shall be presumed fraudulent as against the creditors at that time of the person paying the consideration.' *Supra*, p. 180, note. See *Buchanan v. Buchanan*, 72 Ala. 55. The statute in these cases impresses a trust upon the land in favor of the *existing* creditors of the person advancing the purchase money, which they may enforce in equity. *Wood v. Robinson*, 22 N. Y. 564.

³ *Ante*, pp. 35, 180 note.

erty granted, ample funds to pay his creditors.¹ The difference between the two statutes should not be overlooked.

Suppose however that a conveyance is made by an embarrassed debtor to a member of his family; will that affect the question, what is sufficient to constitute a *prima facie* case? The authorities give somewhat discordant answers. Formerly provisions by a man for his wife or children were not treated as on the footing of ordinary voluntary conveyances; but the contrary is now true both at law and in equity.² Some recent authorities appear to have declared that the creditor makes a case by showing that the debtor, being in failing circumstances, conveyed the property in question to one of his family; such evidence raising something like a presumption that the conveyance was voluntary or otherwise invalid against creditors.³ Indeed it has been declared in many states that, in a contest between creditors and the wife of a debtor, if the wife claims the ownership, by purchase, of property which the creditors are trying to reach, the burden of proof is upon her to show such purchase

¹ Allen, J. in *Dunlap v. Hawkins*, *supra*.

² *Holloway v. Headington*, 8 Sim. 825; *Jefferys v. Jefferys*, 1 Craig & P. 138; *Tweddle v. Atkinson*, 1 Best & S. 393. These cases overrule *Ellis v. Nimmo*, Lloyd & G. 348, and earlier decisions and dicta. See *Exchange Bank v. Rice*, 107 Mass. 37; *ante*, p. 177. But see *French v. Holmes*, 67 Maine, 189.

³ *Thompson v. Loring*, 13 Neb. 386; *Burton v. Gibson*, 32 W. Va. 406, 417; *Lockhard v. Beckley*, 10 W. Va. 87; *Burt v. Timmens*, 29 W. Va. 441. It is held in Maryland, on the construction of the Code, that the fact of a conveyance being made by husband to wife is sufficient to put a purchaser for value

from the wife upon notice; so that if he does not inquire, and it turns out that the conveyance to the wife was invalid towards creditors, the purchaser cannot hold the property. *Green v. Early*, 39 Md. 223; *Mulholland v. McLane*, 64 Md. 455. The court admits that that would not be true under the statute of Elizabeth.

In Missouri a conveyance to a wife, paid for by the husband, is presumptively fraudulent as to his existing creditors. *Jordan v. Buschmeyer*, 97 Mo. 94. See also *Sloan v. Torry*, 78 Mo. 623; *post*, p. 194. So too it is held in Iowa that if a debtor conveys all his property to his son, a young man living with him, this shows fraud presumptively. *Peterson v. Rone*, 76 Iowa, 447.

by clear and satisfactory evidence, and that the purchase was for a valuable consideration paid by her or by some one on her behalf.¹ And this may well be true where the wife is seeking to show a trust in her favor in lands conveyed to the husband, in whole or in part, as she alleges, with her money.² But a different case arises where the property has been conveyed to the wife.³ However the like rule is laid down

¹ *Horton v. Dewey*, 53 Wis. 410; *Gamber v. Gamber*, 18 Penn. St. 363; *Lloyd v. Williams*, 21 Penn. St. 327; *Keeny v. Good*, ib. 349; *Walker v. Reamey*, 36 Penn. St. 410; *Parvin v. Capewell*, 45 Penn. St. 89; *Seeds v. Kahler*, 76 Penn. St. 262; *Rose v. Brown*, 11 W. Va. 122; *Gordon v. McIlwain*, 82 Ala. 247; *Wedgeworth v. Wedgeworth*, 84 Ala. 274; *Moog v. Farley*, 79 Ala. 246; *Lipscomb v. McClennan*, 72 Ala. 151; *Gordon v. Tweedy*, 71 Ala. 202; *Bolling v. Jones*, 67 Ala. 508; *Barnard v. Davis*, 54 Ala. 565; *Meredith v. Citizens' Bank*, 92 Ind. 343; *Erdman v. Rosenthal*, 60 Md. 312; *Besson v. Eveland*, 26 N. J. Eq. 468; *Burton v. Gibson*, 32 W. Va. 406, 417.

The first of these cases has been much limited by *Wheeler Manuf. Co. v. Monahan*, 63 Wis. 198, and held not to apply to cases in which the husband was not indebted when he made the voluntary conveyance. The rule since laid down in Wisconsin is that, where a conveyance by husband to wife is shown to be fraudulent on the part of the husband, the wife must then show that she paid value for it either out of her own property or with funds furnished by a third person for her use. *Brickley v. Walker*, 68 Wis. 563. That rule does not differ from the rule in other cases except in requiring the purchaser to show where the purchase-money came from. See also *Seitz v. Mitchell*, 94 U. S. 580, and cases re-

viewed; *Hinkle v. Wilson*, 53 Md. 287; *Frank v. King*, 121 Ill. 250; *Dresher v. Carson*, 23 Kans. 313; *Adams v. Edgerton*, 48 Ark. 419; *Hoey v. Pieron*, 67 Wis. 262.

Davis v. Zimmerman, 40 Mich. 24, denies that the evidence on the part of the wife should be anything more than preponderating, when all the facts, together with the relationship of the parties, are considered.

In Virginia postnuptial settlements are presumptively voluntary. *Robins v. Armstrong*, 84 Va. 810; *Beecher v. Wilson*, ib. 873. And hence, under the statutes of that state, if the husband was then in debt, they are deemed to be fraudulent, until the wife has shown that she is a purchaser for valuable consideration. See cases cited ante, p. 187, note; *Adams v. Edgerton*, supra.

² *Besson v. Eveland*, 26 N. J. Eq. 468; *Sale v. McLean*, 29 Ark. 612; *Hershy v. Latham*, 46 Ark. 542; *Seitz v. Mitchell*, 94 U. S. 580. See vol. 1, pp. 176, 177, that the evidence should be very strong to fix a trust upon an absolute conveyance.

³ See *Davis v. Zimmerman*, 40 Mich. 24; *Gilbert v. Glenney*, 75 Iowa, 513; *Kane v. Desmond*, 63 Cal. 464; *Richardson v. Subers*, 82 Ga. 427; *Stephenson v. Cook*, 64 Iowa, 265; *Sloan v. Torry*, 78 Mo. 623; *infra*, p. 194, note.

Mortgages by husband to wife, as affecting the husband's creditors, are matter of statute in some states. *Hoey v.*

of contests between creditors and the debtor's parent, where the property has been conveyed by the debtor to the parent ;¹ it is said that there should be clearer and fuller evidence in such cases of an adequate valuable consideration than where the conveyance is to a stranger.² Thus it has been declared in Pennsylvania, of a conveyance by a son to his mother, alleged to have been in fraud of the son's creditors, that stricter proof of the mother's honesty, i. e. honest payment, is necessary than if she were a stranger in blood.³

How far cases of this kind may have been influenced by questions of possession is not clear. Manifestly the question of possession might often be significant in alienations between members of a family residing together or occupying the same lands ; ordinarily there would be no change of possession or enjoyment in the case of a conveyance of land by a husband to his wife, or by a father to his son, or by a son to his father or mother, where all live together or upon the same or adjoining lands.⁴ But the cases in question do not profess to turn upon such considerations ; the question is of payment of value by the grantee, an immaterial thing if possession is not changed. Nor are the cases under consideration cases in which, because fraud has been proved against

Pierron, 67 Wis. 262, from which it appears that the wife must show that the ' mortgage was given in good faith, and to secure an actual indebtedness and the amount thereof.' See also Semmens v. Walters, 55 Wis. 683 ; Evans v. Ruger, 57 Wis. 624.

¹ Lloyd v. Williams, *supra*.

² *Ib.* ; Hubbard v. Allen, 59 Ala. 283 ; Barnard v. Davis, *supra*.

³ Lloyd v. Williams, *supra* ; Scott v. Winship, 20 Ga. 429. But see Reehling v. Byers, 94 Penn. St. 316, 323 ; and see Williams v. Williams, 11 Lea, 355.

⁴ See Gilligan v. Lord, 51 Conn. 562, an important case, quoted in chapter

13 ; Erdman v. Rosenthal, 60 Md. 312 ; Richardson v. Coddington, 49 Mich. 1 ; Ladd v. Newell, 34 Minn. 107 ; Hossfeldt v. Dill, 28 Minn. 469 ; Sanders v. Chandler, 26 Minn. 273 ; Pyron v. Lemon, 67 Ala. 458 ; Tompkins v. Nichols, 53 Ala. 197 ; Jaffers v. Aneala, 91 Ill. 487 ; Jones v. King, 86 Ill. 225.

But retaining possession of land after sale stands upon a different footing from retaining possession of goods sold. To retain possession of lands sold would not *alone*, by the better rule, raise any presumption of fraud. See chapter 13, § 5.

the grantor, the grantee must prove purchase for value in good faith;¹ for fraud has not yet been proved against the grantor,—he has only been shown to be embarrassed, and an embarrassed debtor not in bankruptcy may sell his property for value,² or prefer his creditors.³

Again where there is any evidence that the debtor has paid the price for property the title to which has been taken in the name of his wife or son or other person, a case may arise under statutes like the Statute of Uses and Trusts of New York, already referred to; and it may well be that in such a case strong counter evidence of payment on the part of a grantee, being a member of the debtor's family, stronger perhaps than would be required of a stranger, would be necessary to enable the grantee to hold the property.⁴ But this suggestion does not reach the case of a conveyance by the debtor himself to the member of his family; and the conclusion cannot well be escaped that the language of the law in some of the states has sometimes⁵ gone a great length.

The rule referred to appears to be an extension of intimations from early times, and repeated from time to time in modern cases, to the effect that the transfer of property to a relative is ground for suspicion;⁶ against which may be set

¹ See chapter 18.

² *Thornton v. Lane*, 11 Ga. 459; *Seesel v. Ewan*, 35 Ark. 127; *Lienkrauf v. Morris*, 66 Ala. 406.

³ *Sisson v. Roath*, 30 Conn. 15; *Southern Lead Co. v. Haas*, 73 Iowa, 899; *Walden v. Murdock*, 23 Cal. 540; *Wheaton v. Neville*, 19 Cal. 41; *Randall v. Buffington*, 10 Cal. 491; *Flewel-lan v. Crane*, 58 Ala. 627; *Crawford v. Kirksey*, 55 Ala. 282; *Cavanhaven v. Hart*, 21 Penn. St. 495; *Totten v. Brady*, 54 Md. 170; *Frank v. King*, 121 Ill. 250 (his wife); *Schroeder v. Walsh*, 120 Ill. 403; *Brigham v. Hubbard*, 115 Ind. 474 (wife).

⁴ *Pyron v. Lemon*, 67 Ala. 458. See *Seitz v. Mitchell*, 94 U. S. 580.

⁵ See *Lloyd v. Williams*, 21 Penn. St. 327; *Scott v. Winship*, 20 Ga. 429. But see the late case of *Reehling v. Byers*, 94 Penn. St. 316, 323, where it is said that business relations between parents and children 'must be treated just as are the transactions between ordinary debtors and creditors.'

⁶ *Twyne's Case* 3, Coke, 80, 81 b; *Lloyd v. Williams*, supra; *Knight v. Capito*, 23 W. Va. 639; *Kennedy v. Lee*, 72 Ga. 39; *McCanless v. Flinchum*, 89 N. Car. 373; *Reiger v. Davis*, 67 N. Car. 185; *Renney v. Williams*, 89 Mo.

the intimation made only less frequently that there is a distinction (which once really obtained) ¹ in *favor* of conveyances made upon the meritorious consideration of blood or 'love and affection.' ² Something is to be said for each of these apparently contrary intimations; they are not necessarily opposed to each other. A creditor may well be held to very clear proof of his claim and of the extent of it against a provision which has been made and settled upon wife or child, where the provision is apparently reasonable to the purpose.

189; *Kennedy v. Powell*, 34 Kans. 22; *Post v. Steiger*, 29 N. J. Eq. 556; *Hanell v. Mitchell*, 61 Ala. 270; *Hubbard v. Allen*, 59 Ala. 283; *Barnard v. Davis*, 54 Ala. 565; *Young v. Dumas*, 39 Ala. 60; *Marshall v. Craon*, 52 Ala. 554; *Leppig v. Bretzel*, 48 Mich. 321; *Ladd v. Newell*, 34 Minn. 107 (husband and wife); *Robinson v. Clark*, 76 Maine, 493 (same); *Hoboken Bank v. Beekman*, 36 N. J. Eq. 83; *Thompson v. Feagin*, 60 Ga. 82; *Hempstead v. Johnston*, 18 Ark. 123. But see *Reehling v. Byers*, 94 Penn. St. 316; *Thorpe v. Thorpe*, 12 S. Car. 154; *Williams v. Williams*, 11 Lea, 355; *Kaufman v. Whitney*, 50 Miss. 108.

In *Ladd v. Newell*, *supra*, where a wife claimed crops as having been the product of her land, which crops had been taken by her husband's creditors; the court said: 'Where the husband is largely indebted, and admitted to have been insolvent, as was the case here, family arrangements which may seem to enable the debtor to cloak his property and continue his business under the name of a relative, who may have no actual interest as principal or proprietor in the management of the property or its proceeds, are naturally looked upon with suspicion.'

¹ *Supra*, p. 186.

² See *Winchester v. Charter*, 12 Allen, 606, 608; *Draper v. Buggee*, 133 Mass. 258, 262; *Dunlap v. Hawkins*, 59 N. Y. 342; *Taylor v. Jones*, 2 Atk. 600.

The same question may arise as to conveyances for value. In a recent case relating to a conveyance of land by a mother to her daughters Mr. Justice Fry said: 'It appears plain that though valuable and good consideration was given by the daughters, that consideration cannot have been the full value of the estate. But it also appears to me to be plain that when a bona fide and honest instrument is executed, for which valuable consideration is given, and the instrument is one between relatives, the court cannot say that the difference between the real value of the estate and the consideration given is a badge of fraud; and if it is not a badge of fraud, or evidence of an intention to defeat creditors, it has no relation to the case.' In *re Johnson*, 20 Ch. D. 389, 394. See however *Copis v. Middleton*, 2 Madd. 410, in which Sir Thomas Plumer, V. C. said: 'Is there any fraud in selling to a nephew? He [the uncle] might sell to him. If on account of his relationship he sold it for less than he would have done to another, it might be material; but if he treated with him as he would have done with a stranger, the contract is valid.'

The evidence might well be required to be clearer in such a case than where the grantee was a stranger, or than where the property was still in the hands of the debtor. That however is as far as the matter should or on authority can go. The duty to provide for one's wife or family is no more than a duty to make reasonable provision; and 'reasonable' here means that the provision must not interfere with the claims of real creditors.¹

The other suggestion, or rather statement, that transfers of property to relatives give ground for suspicion is simply founded in common experience. Debtors will try to make away with their property; and they can more safely trust relatives than strangers. Therefore they more commonly convey to relatives; and when they have left little or no margin for creditors, the suspicion may well arise that the transfers have been voluntary. The ground of suspicion may indeed be so strong in a particular case as to constitute a case, and require persuasive evidence to meet it.²

In principle that is as far as the case can go; it is too much to say that relationship, however near, can raise a presumption of fraud against interalienations,³ for a presumption,

¹ *Glaister v. Hewer*, 8 Ves. 195, Lord Eldon; *Seals v. Robinson*, 75 Ala. 363, where the subject is considered at length; *Coates v. Gerlach*, 44 Penn. St. 46; *Jones v. Obenchain*, 10 Gratt. 259.

Speaking of a husband's claim to income of his wife's property, it is said: 'If the husband claim such income as a gift or [by] other legal transfer thereof, by the wife to him, the burden is upon him to establish his claim by evidence.' *Patten v. Patten*, 75 Ill. 451, quoted in *Tomlinson v. Matthews*, 98 Ill. 178. That should suppose that a presumptive case has been made against the wife, where the contest is between the wife's creditors and the husband.

² *Booher v. Worrill*, 57 Ga. 235; *Skel-*

lie v. James, 81 Ga. 419. In *Booher v. Worrill* a husband conveyed all his property to his wife pending suit against him. This was held *prima facie* fraudulent. The court said that transactions between husband and affecting creditors should be scanned closely; if e. g. the conveyance in question was alleged to have been made in payment of a debt due to the wife, the debt should be clearly shown. So in *Skellie v. James*, 81 Ga. 419. That assumes of course that a case of fraud on the part of the husband has already been made. Further see *Frank v. King*, 121 Ill. 250.

³ *Reehling v. Byers*, 94 Penn. St. 316, 323; *Hough v. Dickinson*, 58 Mich. 89; *Stephenson v. Cook*, 64

it is to be remembered, is more than evidence, not to say suspicion. An Alabama case¹ puts the matter rightly. A father largely indebted and finally insolvent having parted with valuable interests in favor of his son, about the time of the son's majority, it was said that the facts invited the 'watchful scrutiny' of the court. So where traders, apparently embarrassed and about a month later in insolvency, sold their entire stock of goods to their brother, taking his note merely for the same, Chief Justice Shaw said that this was 'a strong badge of fraud.'²

But the most direct and satisfactory dealing with the matter is found in a recent Texas case.³ In this case too a father in failing circumstances had conveyed the property in question to his son, and the lower court had given the following instruction in effect to the jury: When a person in failing circumstances makes a deed to his son, and the deed is attacked on the ground of fraud upon creditors, it is incumbent on the son to prove the payment of the purchase-money, and that the payment was not made with intent to defraud creditors. This instruction was now held erroneous; the Supreme Court declaring that the burden of proof lay upon the creditor, and he must prove fraud. 'The fact that the conveyance was made to the son was not of itself sufficient to raise the presumption of fraud.' The grantor's fraudulent intent was to be shown before the grantee was called upon to prove payment of the purchase-money.⁴

At most then relationship is but a circumstance, to be taken into consideration with other facts, if there be such, and that too for or against the conveyance, according to the situation; but standing alone it is a false quantity.⁵ Even

Iowa, 265; *Hempstead v. Johnston*, 18 Ark. 123; *Bumpas v. Dotson*, 7 Humph. 317; *Williams v. Williams*, 11 Lea, 355.

¹ *Barnard v. Davis*, 54 Ala. 565.

² *Perkins v. Webster*, 2 Cush. 480.

³ *King v. Russell*, 40 Texas, 124.

⁴ See *Belt v. Raguet*, 27 Texas, 479; *Kane v. Desmond*, 63 Cal. 464.

⁵ *Shultz v. Hoagland*, 85 N. Y. 464; *Holden v. Burnham*, 63 N. Y. 74; *Hempstead v. Johnston*, 18 Ark. 123;

if it could be said that relationship might raise a presumption that the conveyance was voluntary, it would not follow that the presumption could not be met by evidence which would be sufficient in any other case;¹ unless indeed the position should be taken that the presumption was stronger than ordinary presumptions, a position not likely to be taken.

A distinction obtains between cases in which the wife claims the property under a sale to her by her husband and cases in which she claims under a stranger in blood, if at all events she has a separate estate. Thus in a case² in which goods bought of D by the wife of J were seized in execution as the property of J, the jury had been charged that the wife-claimant need not show from what source she had the money or the means to buy the property. This ruling was sustained by the Supreme Court; the court distinguishing the case from a case in which a married woman derived title from her hus-

Bumpas v. Dotson, 7 Humph. 317; *Linger v. Herron*, 18 Neb. 450; *Schroeder v. Walsh*, 120 Ill. 403; *Hubbard v. Allen*, 59 Ala. 283; *Montgomery v. Kirksey*, 26 Ala. 172; *Robinson v. Frankel*, 85 Tenn. 475; *In re Johnson*, 3 Ch. D. 389, 394; *Copis v. Middleton*, 2 Madd. 410; ante, p. 190, note. See *Fletcher v. Willard*, 14 Pick. 464.

In *Shultz v. Hoagland*, supra, the court says: 'The relationship of assignor and assignee, and their intimacy and friendship, and the preference given to the latter as a creditor, prove nothing by themselves. They are consistent with honesty and innocence, and become only important when other circumstances, indicative of fraud, invest them with a new character and purpose, and transform them from equivocal and ambiguous facts into positive badges of fraud.' See *Kane v. Desmond*, 68 Cal. 464. What is said ante, p. 84, may also be referred to.

¹ See *Schroeder v. Walsh*, 120 Ill. 403; *Hough v. Dickinson*, 58 Mich. 89; *Davis v. Zimmerman*, 40 Mich. 24, an important case in which Cooley, J. said: 'No doubt the circumstances of the relation and the facility with which frauds may be accomplished under the pretence of sales or gifts between husband and wife ought to be carefully weighed in determining whether or not a gift has been made, but when all are considered, the one question and the only question is whether the wife has established her right by a preponderance of evidence. If she has, no court has any business to require more.' So in *Brown v. Mitchell* 102 N. Car. 347, 370, the case of purchase by the wife is put in the same way in effect as it would be in the case of any other purchaser, after proof of fraud in the vendor; she is simply to show that she has paid her own money.

² *Richardson v. Subers*, 82 Ga. 427.

band. In the latter case the burden was cast upon the wife 'to make a fair showing about the whole transaction;' and, assuming that the husband has not been held out as owner by the wife, this appears to be sound doctrine. There is no sufficient reason in such a case to suppose that the property was bought by the husband through the agency of the wife; it is for the creditor to make out the fact by evidence.¹

§ 3. RELATION OF MEANS TO DEBTS: RULES OF GUIDANCE.

Having now disposed of these preliminary questions, we are brought to the question of the relation which ought to exist between the means of the debtor available at the hands of his creditors, after the gift has been made, and the debts which he owes. 'After the gift' we say; the test never is of the ability of the debtor, or the availability of his means, before or at the time of the gift. Such a test would go far to destroy the statute. In regard then to the relation of means to debts after the gift, it must be observed at the outset that the law has not laid down any ratio to be observed between the two, or declared that there should be any fixed margin of available means. The law speaks in general terms, content to lay down a few rules of guidance for determining whether the claims of creditors have been impaired; after that, leaving each case to be decided upon its own facts. That is to say, cases falling within these general rules are in the main isolated instances rather than declarations of any rule of law, and are to be used in the decision of other cases only for what they may be thought to be worth. Let us then endeavor to ascertain these 'rules of guidance.'

¹ See also *Stephenson v. Cook*, 64 Iowa, 265. It is held in Missouri however that, where a married woman claims property against her husband's creditors, which has been conveyed to her during coverture, if it is not shown to have been paid for out of her separate estate, it will

be presumed to have been paid for by her husband. *Sloan v. Torry*, 78 Mo. 623. See *Jordan v. Buschmeyer*, 97 Mo. 94; ante, p. 186. But that may be doubted. See *Stephenson v. Cook* and *Richardson v. Subers*, supra.

In the first place, of the debtor's means; upon this point the first remark to make is that if the debtor's voluntary alienation amounts to an 'act of bankruptcy,' it is invalid against creditors, regardless of his actual condition in point of means. It is equally true that if the debtor has already committed an act of bankruptcy, which may still be turned against him, any voluntary alienation following is invalid.

It is not then the debtor's actual condition in point of means that furnishes the test of the validity of the voluntary alienation. A man may be considered insolvent as matter of law, where he has concealed his property, though in point of fact he may be perfectly solvent. In a Massachusetts case¹ the judge had instructed the jury that if a debtor has concealed his property fraudulently, to avoid payment of his debts and to prevent his creditors from taking it, he may be proceeded against as insolvent, though his property may consist of money in his pocket and may be sufficient to pay all his debts; and the instruction was upheld.² That being true, it follows that a creditor would make a case against a voluntary alienation by his debtor by showing that even if he had means left with which to pay his debts, they were effectually concealed or placed where they could not be taken, or were in some distant state and not easily obtainable.³

The law provides us with another 'rule of guidance,' in regard to cases in which the debtor may not have committed any act of bankruptcy, but yet is in a condition in which the laws of bankruptcy or insolvency could be enforced against him. And that rule is, that a debtor cannot be considered to be in a condition to make a gift, in justice to his creditors,

¹ *Bartholomew v. McKinstry*, 6 Allen, 567; *a. c.* 2 Allen, 488. insolvent who had money enough in his pocket to pay all his debts, if he had

² This was of course under insolvency laws, a subject which will follow directly after the statutes of Elizabeth are disposed of. A quære may be added whether a man could be treated as not put it there to circumvent his creditors? The cases however speak of property which can be reached by creditors, as will be seen.

³ *Baker v. Lyman*, 53 Ga. 339.

where, though his nominal assets may still be ample, at their face value, for the payment of his debts after the withdrawal of the property in question, he cannot readily make his assets available to the amount required.¹ This is well shown in the case first cited. Suit had been brought to set aside a voluntary conveyance of land by a father to his daughter, the property being worth something like \$15,000. The father had at the time a large amount of property in St. Louis, estimated by some witnesses to be worth \$156,000; he was then in debt however to the extent of \$80,000 or \$90,000, secured by deeds of trust upon the same property, on which extensions had been given from time to time; he had but little unincumbered property save that which was the subject of the suit; taxes were not all paid. The court considered the father, upon these facts, as in embarrassed circumstances; 'nothing but the best of management and good credit could save him from ruin.' Judgments and foreclosure sales followed in rapid succession; and the conveyance was held fraudulent; the court laying down the sound rule that if a debtor in embarrassed circumstances makes a voluntary conveyance, and is afterwards ² unable to meet his debts of the time of the conveyance in the ordinary course, the conveyance may be treated as void by those to whom the debts are due.³

¹ *Lionberger v. Baker*, 88 Mo. 447; *Patterson v. Kinney*, 97 Ill. 41; *Marmion v. Harwood*, 124 Ill. 104; *Goodman v. Wineland*, 61 Md. 449; *Warner v. Dove*, 33 Md. 586; *Bullett v. Worthington*, 3 Md. Ch. 99; *French v. French*, 6 De G. M. & G. 95; *Freeman v. Pope*, L. R. 5 Ch. 538; *Ex parte Russell*, 19 Ch. D. 588; *In re Ridler*, 22 Ch. D. 80. See also *Baker v. Lyman*, 53 Ga. 339.

² Perhaps a limit should be set to the time 'afterwards;' for the debtor may have got out of difficulty and gone on for a long time solvent and prosperous, before the final trouble. Creditors entirely unconnected with the debtor at

the time of some objectionable conveyance, made by him long ago, can seldom object to it. *Union Life Ins. Co. v. Spadds*, 99 Ill. 247. As to the rights of future creditors in respect of a conveyance made with intent to defraud existing creditors, whose debts had not all been paid when the claims of such future creditors were created, see ante, pp. 97 et seq.

³ The court cited *Potter v. McDowell*, 31 Mo. 62; *Patton v. Casey*, 57 Mo. 118; *Payne v. Stanton*, 59 Mo. 158. For a similar case to that of the text see *Elwell v. Walker*, 52 Iowa, 256, infra, p. 198.

Indeed a man may have perfectly good and even unincumbered property interests, sufficient eventually, it may be, to meet all his engagements, but if they are so situated¹ or of such a nature that he cannot turn them at once to his present needs, and with them, together with whatever other means he may have available, satisfy presently his creditors after the voluntary alienation, that alienation cannot stand against them.² Thus it is laid down to be no answer to the claim of creditors delayed by a voluntary alienation made by their debtor, that the debtor has debts owing to him, or contingent or reversionary interests, which if realized or fallen in would be sufficient to meet all claims upon him.³

The matter of a man's good-will in trade affords a special illustration. In a recent English case⁴ the good-will of a debtor's business was supposed to be of considerable worth; and the point was accordingly urged that that fact should be taken into account in considering the debtor's condition towards his creditors. The learned Master of the Rolls (Sir George Jessel) was quite willing to believe that the good-will was of value; 'but,' said he, 'can that be called an available asset when a man is carrying on his trade? Is he able to pay all his debts because he might possibly, after the lapse of considerable time, sell the good-will of his business?' And then the Master of the Rolls goes to the root of the matter by saying that the debts were payable presently; that is, the creditor cannot be put off against his will by the debtor.⁵

The question then is of the debtor's present ability to pay creditors whose debts are due.⁶ Indeed even this rule cannot

¹ As by being in a distant state, and not in a readily obtainable or available form. *Baker v. Lyman*, 53 Ga. 339.

² *French v. French*, 6 De G. M. & G. 95; *In re Pearson*, 3 Ch. D. 807; *Munson v. Ellis*, 58 Mich. 331; *Marmon v. Harwood*, 124 Ill. 104, holding also that it makes no difference that

funds were put into the hands of a third person sufficient to pay all debts, if he used them for some other purpose.

³ *French v. French*, *supra*.

⁴ *In re Pearson*, *supra*.

⁵ Further see *French v. French*, 8 De G. M. & G. 95; *O'Bryan v. Koontz*, 83 Mo. 323.

⁶ See also *Barkley v. Tapp*, 89 Ind.

be relied upon by the debtor as inflexible. A debtor having property subject to fluctuation in value must be very circumspect in making gifts; the law will not permit him to calculate nicely the relation of what will remain, to his debts. He must take into account the possibility of the depreciation in value of the property he retains, where it is of a kind to be subject to frequent fluctuation. In a recent case¹ a debtor had made voluntary conveyances of considerable amounts to his wife, retaining real property in St. Louis the value of which, according to testimony given, was then largely in excess of the debts which he owed. But property of the kind, and this with it, soon afterwards greatly depreciated; and this, which was heavily incumbered, disappeared, nothing being left for the payment of the plaintiff's claim. The court considered that the valuation had been put too high, and that the contingency of depreciation should have been taken into account by the debtor; fluctuations in the value of land were constantly taking place and should therefore be anticipated.

It is otherwise of losses of an accidental kind, as by fire or flood, or other event not fairly to be taken as within the range of probability or foresight.² Perhaps the possibility of losses in business need not be taken into account by the debtor, where the business is not one of special hazard; though voluntary conveyances even in such cases will call for more searching scrutiny than in others. Trade is always hazardous to some extent; and large gifts by traders who subsequently fail may well be looked upon with suspicion; they might in many cases have a bearing, though the trade was not particularly hazardous, upon the fact to be proved, the 'intent' to defraud. It is clear however that the subsequent insolvency of the grantor is not enough to invalidate a prior voluntary convey-

25. Insolvency shown to exist at one time will be presumed to exist at a subsequent date not far removed, in the absence of evidence. *Ib.*

¹ *Elwell v. Walker*, 52 Iowa, 256.

² *Elwell v. Walker*, *supra*, referring to *Bump, Fraudulent Conveyances*, 286.

ance;¹ but if a man convey most of his property voluntarily, and shortly afterwards is insolvent, the conveyance will, it is held, be deemed fraudulent.²

It is clear too that the debtor cannot reckon as part of his means invalid claims and claims upon which the Statute of Limitations, the Statute of Frauds, usury, or the like could be pleaded. He has no right in any such case to suppose that his own debtor will not raise the defence; though perhaps if a claim of his against another is partly valid and partly invalid, he will be entitled to take the valid part into account, provided the valid part can by law be separated from the invalid. In regard to debts due to him which are otherwise worthless, as a matter of fact, it seems that these too must be left out of his balance sheet.

Further in its purpose to preserve a just relation between means and debts, the law will take into consideration the question whether the debtor was then engaged,³ or was on the point of engaging, or was soon after in fact engaged, in a hazardous business, in speculation, or the like. If he was, then

¹ *Barkley v. Tapp*, 87 Ind. 25.

² *Hood v. Jones*, 5 Del. Ch. 77.

³ *Carpenter v. Roe*, 10 N. Y. 227; *Dygert v. Remerschneider*, 32 N. Y. 629; *Savage v. Murphy*, 34 N. Y. 508; *Case v. Phelps*, 39 N. Y. 164; *Young v. Heermans*, 66 N. Y. 374; *Nippes's Appeal*, 75 Penn. St. 472; *Monroe v. Smith*, 79 Penn. St. 459; *Claffin v. Mess*, 30 N. J. Eq. 211; *Bates v. Cobb*, 29 S. Car. 395; *Fisher v. Lewis*, 69 Mo. 629. See *Shank v. Simpson*, 114 Penn. St. 208; *Truesdell v. Sarles*, 104 N. Y. 164, 169; *Todd v. Nelson*, 109 N. Y. 316, 327, that the grantor's husband, or intended husband, is not to be deemed the grantor within the rule.

In *Carpenter v. Roe*, *supra*, the court says: 'Roe does not deny that he was deeply in debt at the time; he denies that he was insolvent. The extent of

his obligations may be inferred from the fact that fifty days subsequent to the conveyance he was utterly insolvent, and has so continued to the commencement of this suit. He states that when the debt to the complainant was contracted, he was solvent, and that his insolvency was owing to the sudden fall in the price of grain, etc. The result of his allegations is that, although he was largely in debt, yet if the article in which he traded had advanced in price, or if its value had continued as he had reason to suppose when his indebtedness accrued, he would have been solvent and have had a surplus. All this might be stated with truth by the most reckless speculator that ever hazarded the property of others on the contingency of a fluctuating market.' See also *Truesdell v. Sarles*, 104 N. Y. 164, 169.

the fact that he was largely in debt when he made the gift, or that, not being largely in debt or not being in debt at all, he made a gift embracing a considerable part of his estate will be fatal; the gift will not be allowed to stand, against his creditors.¹

In regard however to engaging in a business of hazard, this should be said; that where there is no evidence to show that the gift was made in contemplation of entering into the hazardous business, in other words in contemplation of future debts, and so in the eye of the law with intent to defeat future creditors,² it should appear, if the debtor is not already engaged in such a business, that he engaged in it soon after making the gift.³ There must be a connection between the gift and the subsequent credit. The statute speaks of an 'intent' to defraud, and though, as we have seen, that word is not to be taken in its popular sense of personal design, still it does point to a necessary connection between the act of the debt and the loss to the creditor.

To put the case in another way, if a man has made a gift of property such as at the time is valid against creditors, he should not directly afterwards engage in some hazardous business, for the act would reflect back, so to speak, the 'intent' of the law to defraud creditors. The debtor knows that he has made a voluntary alienation of property, and impaired his means by so much, and if that is considerable, he knows that now to engage in a hazardous business would be to expose his creditors perhaps to great loss. The connection between the gift and the loss would thus be made out; there would be an 'intent' to defraud.

If however the gift was made long ago, and the changes usual in life have since taken place, it would be straining the facts to connect the gift with the loss, as by declaring that

¹ Cases in note 3, p. 199.

² *Ib.*

³ *Sexton v. Wheaton*, 8 Wheat.

229; *Todd v. Nelson*, 109 N. Y. 316, 328.

the later act, so far removed, reflected back an intent to defraud. This is illustrated by a case¹ in the Supreme Court of the United States, already referred to, in which a debtor made what at the time was a proper gift, and then two years later went into a hazardous business in which he ultimately failed. The gift was sustained against his creditors.

A recent English case² should be noticed in this connection to distinguish it. A man not in debt, and not engaged in trade, settled in the year 1858 a sum of £1,000 voluntarily on trusts, providing for a life estate to himself determinable upon his bankruptcy, then a life estate to his wife, then trusts for his children, and an ultimate remainder for himself. Fifteen years afterwards he went into trade, and in the course of two years failed. The settlement was now held void under the statute of Elizabeth; but this was on the ground that the settlor had made it in such a way that as soon as creditors should acquire a claim upon the property it should go over to some one else. That is to say, there was contemplated fraud in the settlement itself; hence it mattered not how long afterwards the business was undertaken.³

The term 'hazardous business' or 'speculation' does not quite come up to the rule of law, if these words are taken in their ordinary sense of something of a hazardous *nature*. The business of grocer or baker is not in ordinary circum-

¹ *Sexton v. Wheaton*, 8 Wheat. 229; ante, pp. 113, 114.

² *In re Pearson*, 3 Ch. D. 807.

³ Bacon, C. J. said: 'The settlor in effect says, "I have got £1,000; I do not intend my creditors to have a farthing of it; and to accomplish that purpose I will settle it in such a way that if by any accident my creditors should hereafter have a claim to it, it shall go to some one else." That is as plainly fraudulent as

possible. Section 91 of the Bankrupt Act has nothing to do with the case.'

A different case is made where A gives to B property on the terms that it shall go over to another in the event of B's bankruptcy. *Brandon v. Robinson*, 18 Ves. 428. See *Sparhawk v. Cloon*, 125 Mass. 263; *Broadway Bank v. Adams*, 133 Mass. 170; *Nichols v. Eaton*, 91 U. S. 716; post, 222, 223. That would not be to defraud the grantor's creditors.

stances a business in itself hazardous to one familiar with it; but the grocer's business would be hazardous to the mere baker, and the baker's to the mere grocer. Any business might be hazardous to a stranger to it; and so the authorities treat the matter. Thus:—

In a recent case¹ a baker who in the course of years had saved some money in his business was minded to buy out a grocery business, in which he had had no experience, and to add that to his business of baker. Before doing so he settled the bulk of his property upon his wife and child, and then, about a month afterwards, bought the grocery business, carried it on for some six months, lost money by it, then sold it for as much as he gave for it, continued in the old business only, and about three years from the time of the settlement failed. It was now held that the settlement was fraudulent within the statute of Elizabeth; and this without regard to the fact that the good-will of his business as baker might be of considerable value. The settlement was held invalid because it had evidently been executed with a view to putting his property out of the reach of his creditors if he should fail in the new business.²

It may be that the debtor's liability, whatever its present and immediate aspect towards the creditor, is not in the end primary and that the creditor knows the fact; he is liable in whole or in part for the debt of another, as where he is a surety or guarantor, to the knowledge of the creditor, or he is an indorser of negotiable paper. And the question arises in such a case whether the law will regard such a situation in considering the debtor's means after the alienation; that is, will the law permit the debtor in such cases to consider the assets of the principal debtor or the prior parties in the matter of negotiable paper? The question, it ought to be stated, relates to cases the event of which is uncertain, i. e.

¹ *Ex parte Russell*, 9 Ch. D. 588,
C. A.

² *Mackay v. Douglas*, L. R. 14 Eq.
106.

cases in which it is not yet known whether the surety, guarantor, or indorser may be called upon.¹

In a recent case² before the Court of Appeal it appeared that a guarantor for debts of a considerable amount owed by his son made a voluntary settlement of leasehold property, that the son and father together had property enough, immediately after the settlement, to pay the debts guaranteed, and that the grantee in the settlement was liable for rent of the leasehold premises. It was urged on behalf of the settlement that a person liable as guarantor was not to be regarded for present purposes as being indebted in the sum guaranteed without taking into account the assets of the principal debtor as well as his own; but the court denied this, declaring that the case should be looked upon as if the event had already happened of the debtor's turning out unable to pay. The argument for the settlement came to this, that a guarantor could make a settlement of the whole of his property, if it could be shown that, at the time, the principal debtor had property enough to pay his debt; that doctrine would go far to defeat the contract of suretyship.³ It has been held in

¹ A kindred question is worthy a passing notice. Could a creditor proceed against an alienation of his debtor, which was made with intent to defraud him, where the debtor's liability, which might have been considerable (by reason of his being surety or indorser) turns out to be nominal? It would seem not. Liability for costs actually incurred would not be nominal. *Stevens v. Works*, 81 Ind. 445. See *infra*, note 3, Lord Selborne. In *Pelham v. Aldrich*, 8 Gray, 515, the costs had not been incurred at the time of the alienation; besides, the alienation was treated as for value, 'though perhaps not adequate.' That case however goes to the verge of the law. Ante, pp. 103, 109 n.

² In *re Ridler*, 22 Ch. D. 74, C. A.

³ *Ib.* Lord Selborne; *Goodricke v. Taylor*, 2 De G. J. & S. 135. 'I do not say,' said Lord Selborne, in the first of these cases, 'that there might not be a state of things in which the liability of the guarantor might be so remote that it would not be regarded; but if he conveys away all his property by a voluntary settlement, I think it doubtful whether the settlement could in any case be supported in the event of his ultimately being called on under his guaranty.' The other judges pointed out that the settlement could not be considered as for value because the settlor had become exonerated from paying rent, distinguishing if not doubting, *Price v. Jenkins*, 5 Ch. D. 619.

this country that if the surety's liability is only nominal, and it turns out that there is no default by the principal, the liability will not justify a conveyance by him to the surety, by way of indemnity, against the claims of others.¹

If the decision of the case in the Court of Appeal is sound, as it appears to be, a wrong decision was reached in a Massachusetts case.² A debtor had made a conveyance of land to his sons partly upon valuable consideration, partly as a gift. The whole amount of the grantor's debts at the time was stated at a certain sum; but in making up the sum certain promissory notes, of which the debtor was a joint and several promisor with another, were reckoned. The court declared that if these were the debts of the grantor alone, the other promisor being a mere surety, then the sum named was to be taken as the true amount of the grantor's debts; but if the notes really represented a joint debt between the promisors, then the general sum was to be reduced accordingly, the joint debt being cut down one half. The point however was not reasoned by the court.

It is clear as a general rule, as we have seen, that the test of the debtor's ability to make the gift is to be measured by his condition just after he has made it, and that equity will have jurisdiction to act on behalf of the creditor, against the gift, if there has been no long delay, notwithstanding the fact that the debtor's fortunes may have improved afterwards, and have put him in a situation to pay all his debts. But in such a case the court, though as matter of discretion only, would probably so frame its decree as to give the debtor a day for the payment of his debt; it would not, it is held, dismiss the bill and remit the creditor to a suit at law, pending which

¹ Crawford v. Kirksey, 55 Ala. 282; s. c. 50 Ala. 590. The acts to be indemnified against may be wholly in futuro. Gardner v. Webber, 17 Pick. 407.

² Norton v. Norton, 5 Cush. 524. See also Robinson v. Rogers, 84 Ind. 539.

the debtor might lose or dispose of the very property for having which the bill was dismissed.¹ The creditor's rights cannot turn upon the fluctuations of the debtor's fortunes; and yet it seems equally clear that it is no ground for proceedings of the kind that the debtor once, many years before, made a voluntary conveyance which he was not in condition to make or which made him insolvent.

On the other hand if the debtor was in a proper condition to make the gift at the time, his condition later, when he may be completing the transaction by delivery, will not invalidate it, assuming that meantime his conduct or relation to the property has not brought him within the statute. Thus if the subsequent transaction is the mere matter of the execution of a deed, the property having before been delivered, the fact that at the time of executing the deed he was insolvent will not bring the transaction within the statute of Elizabeth.² The subsequent completion of the title of the grantee may well operate, in such a case, by relation back to the time of solvency; there has been nothing since to operate unjustly upon creditors.³ A different case would be made by evidence that the grantor had remained in possession all the time since the gift, or that the failure to complete the title had otherwise led creditors reasonably to suppose that the property belonged to the grantor.

It is thought too that the personal factor in regard to the debtor may sometimes properly enter into the case. In an

¹ *Goodman v. Wineland*, 61 Md. 449. *v. Dutens*, 1 Ves. jr. 196. Contra, now. See also *King v. Thompson*, 9 Peters, 204; *Posten v. Posten*, 4 Whart. 27. Ante, p. 134. The rule in *Dundas v. Dutens* has obtained in some of our

² *Patterson v. Kinney*, 97 Ill. 41. courts. Ante, pp. 133-135. See *Hawks v. Phillips*, 7 Gray, 284. It may however be within the Statute of

Frauda. There is grave doubt whether the subsequent execution of a writing in a case requiring a writing under the statute would avail. Formerly it was held in England that it would. *Dundas* ³ Comp. *Blodgett v. Hildreth*, 11 Cush. 311; *Nickerson v. Baker*, 5 Allen, 142; in regard to preference, with which however the text must not be confused.

important case¹ in Virginia it appeared that a young man, much embarrassed with debt, of extravagant and dissipated habits, had settled part of his estate upon his wife and children, the children being then infants and living with him, but had retained property enough to pay all his debts if it were then so applied. But the court took into consideration the probability, judging from the habits of the debtor, that it would not be so applied, that it would be squandered, and judged of the conveyance accordingly. What right, it was asked, had the debtor, with creditors pursuing him, to withdraw a considerable part of his estate, and require them to look to the residue? The risk of loss was thus increased because of the debtor's wastefulness and mismanagement of his property. It was idle to say that he had property enough left to pay his debts if only he chose so to apply it.²

Finally there are things personal to the debtor himself which he may give to another, regardless of his pecuniary condition. He may give his time and labor, as a gratuity, to another if he will; and his creditors cannot reach the value of it and turn it to their own account in any way. He is not bound to work, or if he does, to work for them.³ So too he may emancipate his minor children, without hindrance of creditors;⁴ and he may forego the benefit of the Statute of Limitations.⁵

¹ *Hunters v. White*, 3 Gratt. 26.

² This appears to have been before the final adoption in Virginia of the rule of Chancellor Kent in *Reade v. Livingston*, 3 Johns. Ch. 481; under that rule debts alone being enough to defeat a voluntary conveyance. *Ante*, p. 180.

³ *Abbey v. Deyo*, 44 N. Y. 343; *Eilers v. Conradt*, 39 Minn. 242; *ante*, p. 129.

⁴ *Atwood v. Holcomb*, 39 Conn. 270; *ante*, p. 133.

⁵ *Ante*, pp. 133-135.

CHAPTER IX.

INTENT TO DEFRAUD CONTINUED: TRUSTS AND
RESERVATIONS.

§ 1. INTRODUCTORY: OLD LEGISLATION.

THE question proposed in chapter seventh, of the meaning of the word 'intent' in the phrase 'intent to delay, hinder, or defraud' has in the last chapter received one detailed answer of a positive kind, touching voluntary alienations. But this is not the only answer to be given; and we come now to a class of alienations, voluntary or for value, it matters not which, though they are commonly voluntary, in which the 'intent' is found in certain benefits, usually in the form of some trust or reservation, retained by or given to the alienor, which are inconsistent with the rights of his creditors. Here again we shall find that the word 'intent' is a technical term of the law, having its own meaning, and not the meaning attached to it in popular speech; and we shall see at the same time how well the definition of fraud given at the beginning of this work agrees with the state of the law, and, what is more, how helpful it is in resolving perplexing questions by eliminating much of the discussion in regard to intent.

This subject of trusts in favor of debtors carries us back more than five hundred years, to a statute of the reign of Edward the Third, given in a preceding chapter, against conveyances of lands by debtors 'to their friends, by collusion of having the profits thereof at their pleasure;' ¹ which statute, a little more

¹ 50 Edw. 3 (1376-7), ante, pp. 21, 22.

than a hundred years later, was supplemented by another, of the reign of Henry the Seventh, also given heretofore, in which it is declared that 'all deeds of gift of goods and chattels, made or to be made of trust, to the use of that person that made the same deeds, be void and of none effect.'¹ The statute of 13th Elizabeth, which was perhaps a broad codification of the earlier statutes,² dropped the specific declaration of these statutes for the general words under consideration. That it was not intended to change the law was soon afterwards, in the same reign, shown by a famous decision³ of the Star Chamber.

That case is commonly treated as the fountain-head of all our law upon this subject of secret trusts and reservations, and should be stated here. Sir Edward Coke's summary statement of the case is to this effect: A, being indebted to B in £400, and to C in £200, being sued in debt by C, pending the writ makes a secret assignment of all his goods and chattels to B generally, without exception, in satisfaction of his debt, but still continues in possession and sells some sheep and sets his mark upon others. In an information for fraud against the donor, filed by Coke, who was then

¹ 3 Henry 7, c. 4 (1487-8).

² There may be some doubt whether the statute of 13th Elizabeth was intended to codify and supersede the earlier legislation above mentioned. The revisers of the statutes of New York, following earlier legislation in that state, appear to have thought that the statute of Elizabeth had nothing to do with the older statutes; and they accordingly drafted a separate statute to meet the case of trusts in personalty. In the Rev. Sts. of 1829 this special piece of legislation, expanded from an Act of February 26, 1787, appears as follows: 'All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods,

chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person.' 2 R. S. 135, § 1. This legislation has been very widely copied, in addition to the general legislation touching fraudulent conveyances. See Burrill, Assignments, § 347. It has not however been the subject of much judicial consideration; most of the questions arising upon the broader legislation against alienations with 'intent to hinder, delay, or defraud creditors.' See *Curtis v. Leavitt*, 15 N. Y. 119; *Goodrich v. Downs*, 6 Hill, 438; *Mackie v. Cairns*, 5 Cowen, 380.

³ *Twyne's Case*, 3 Coke, 80.

Attorney-General, it was held that this was a fraudulent gift within the statute of 13th Elizabeth, because, *inter alia*, the donor continued in possession and used the property as his own; 'it was made in secret pending the writ; there was a trust between the parties.' And for this reason it was not within the proviso of the statute, though made upon valuable consideration.¹ The defendant was accordingly convicted.

Two broad classes of cases are suggested by the preceding paragraphs, one suggested by the early statutes, the other by the case in Coke. The statutes speak of cases in which the property (lands in the earlier, goods in the later statute) is conceived to have been delivered to the alienee upon trust for the alienor; the case in Coke speaks of the property as retained by the alienor upon trust for the alienee. So far as the early statutes are concerned, they appear to have had little if any influence upon the course of the law of England in modern times; they refer to voluntary conveyances, and these would be within the prohibition of the statute of Elizabeth, when they affected the rights of creditors, regardless of any trust. But the course of the law in recent times has pursued the lines of the two classes of cases, and marked a clear distinction between them; and the old statutes are not without interest therefore in what they suggest. Besides, the later one of them has been widely adopted in the United States.²

There is something further concerning these early statutes, which deserves remark; they speak of gifts to strangers (in the name of 'friends'); they prohibit gifts to 'friends' upon trust for the donors. Whether the term was intended to include creditors (creditors are not always regarded as 'friends') is not clear; probably it would have been construed to include them. But whether that construction was adopted or not, in our time the law in respect of trusts of the kind designated applies equally to alienations to creditors and alienations to

¹ See *ante*, p. 24, note 2.

² *Supra*, p. 208, note.

strangers; indeed it is more frequently concerned with trusts in the first kind of cases than with trusts in the second.

And again it should not escape notice that, between the two statutes, trusts in lands as well as in goods are condemned. This is a subject about which modern law has not been so clearly defined. Trusts in goods have been widely condemned by statute in America, following either the legislation of New York, which followed that of Henry the Seventh, or directly following that early piece of legislation; while the previous statute, relating to lands, has not been copied to any considerable extent, the subject being left to fall within the more general legislation of the statutes against fraudulent conveyances. And the result is that there has been some doubt whether absolute alienations of lands alone, to strangers, subject to some external trust or reservation for the benefit of the grantor, in no way indicated by the deed, were within the meaning of the law, as showing an 'intent to delay, hinder, or defraud.' But the better view is that they are,¹ and that

¹ Dyer, 294 b (first case on the stat.); (same); Watkins v. Arms, 64 N. H. 99 Lukins v. Aird, 6 Wall. 78; Oriental (same). See also Larkin v. Mead, 77 Bank v. Haskins, 3 Met. 332; Low Ala. 485; s. c. nom. Keel v. Larkin, v. Wortman, 44 N. J. Eq. 193, 200; 83 Ala. 142; Clark v. Jones, 5 Allen, Scott v. Hartman, 11 C. E. Green, 89; 379; Plimpton v. Goodell, 143 Mass. Sayre v. Fredericks, 1 C. E. Green, 365, where there was a real intention 205, 208; Foster v. Knowles, 42 N. J. to defraud. See Todd v. Nelson, 109 Eq. 226; Plunkett v. Plunkett, 114 N. Y. 316, *infra*. (It may be remarked Ind. 484; Blackman v. Preston, 123 that the case of a trust in favor of a Ill. 381; Tyler v. Tyler, 126 Ill. 525; man who buys land and has the title Gordon v. Reynolds, 114 Ill. 118; made to a volunteer stands upon an- Mitchell v. Sawyer, 115 Ill. 650; other footing, to wit, that of a vol- Scheble v. Jordan, 30 Kans. 353; Smith untary conveyance. See chapter 5; v. Conkwright, 28 Minn. 23; Gross v. Peterson v. Farnum, 121 Mass. 476.) Eddinger, 85 Ky. 168; Allison v. Hagan, In Lukins v. Aird, the court, by 12 Nev. 38; Campbell v. Davis, 85 Ala. Davis, J. said: 'The law will not per- 56 (absolute deed recorded, but intended mit a debtor in failing circumstances to as a mortgage); Hill v. Rutledge, 83 sell his land, convey it by deed without Ala. 162 (same); Danner Land Co. v. reservations, and yet secretly reserve to Stonewall Ins. Co. 77 Ala. 184 (same); himself the right to possess and occupy Ives v. Stone, 51 Conn. 446 (same); it . . . for his own benefit. Such a Smith v. Lowell, 6 N. H. 67 (same); transfer may be upon a valuable consid- Stratton v. Putney, 63 N. H. 577 eration, but it lacks the element of good

too whether the trust is created by writing or orally,¹ perhaps upon the footing that the statute of 13th Elizabeth was practically a codification of the earlier statutes, and so has passed down to us in its various forms in the United States. The law should no more in the case of lands than of goods permit a seller, when the buyer's creditors attach the property, to say, 'It is mine,' and the buyer, when the seller's creditors attach it, to say, 'It is mine.'² 'Now you see it, now you don't' is a game of rogues.³

These objectionable trusts in lands differ from the like

faith; for while it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it, inconsistent with its terms, securing a benefit to the grantor at the expense of those he owes.'

The case of *Tibbals v. Jacobs*, 31 Conn. 428, is opposed to the rule in *Lukins v. Aird*. See also *Skellie v. James*, 81 Ga. 419. But the court in *Tibbals v. Jacobs* seems to have confused the effect of retaining possession of land after sale with that of secret trusts in derogation of the terms of a recorded deed. A trust of that sort is in principle as much a fraud upon creditors as a trust in chattels absolutely aliened; though where the latter sort of trust is only presumptive evidence of fraud, as in Massachusetts (see chapter 10), the former will be no worse. See *Oriental Bank v. Haskins*, 3 Met. 332, 337; *Cutler v. Dickinson*, 8 Pick. 386.

As to deeds absolute, in contests between the parties thereto, see *Hassam v. Barrett*, 115 Mass. 256; vol. 1. p. 460; as to retaining possession of land, see chapter 13, § 5; as to conveyances in consideration of the support of the grantor, see chapter 18, § 5.

Where the grantor has no creditors to defraud, and has no intent to defeat future creditors, lands may be conveyed

upon secret trust for the grantor's benefit; as where a wife so conveys for fear her husband's creditors may otherwise reach the property. *Todd v. Nelson*, 109 N. Y. 316. Nor will the conveyance be treated as per se, or prima facie fraudulent against creditors whose claims are created e. g. more than four years after the conveyance. 1b. In this case the grantor, on obtaining the subsequent credit, made a sworn statement that she owned the land, which indeed she had continued to possess and enjoy after the conveyance; but this was held no evidence that that conveyance was made with intent to defraud the creditor, however persuasive it might be of present intent to defraud him.

The wife may of course always seek to protect her own property from the creditors of her husband. *Burton v. Gibson*, 32 W. Va. 406, 418; *Quidort v. Pergeaux*, 18 N. J. Eq. 472. But there may be a question whether, as to creditors, the property is not to be treated as the husband's by reason of fault of the wife.

¹ *Tyler v. Tyler*, 126 Ill. 525.

² In a contest between the seller's and the buyer's creditors the former will prevail. See chapter 16, near the end.

³ See *Collins v. Myers*, 16 Ohio, 547, quoted in chapter 10.

trusts in regard to goods in that they are 'secret;' in the sense, that is to say, that they are not referred to in the recorded deed. The registry is the evidence, in this country, of title to lands; lands do not pass by delivery in the ordinary sense, as they did at common law (by livery of seisin), and possession is not the evidence of title for the purposes of an attaching or execution creditor.¹ Goods however pass by delivery; and possession is the sign of ownership.² The consequence is that the secrecy of the trust is seldom if ever a *test* of the intent to defraud in the alienation of goods; the test is found in the fact that the vendor retains possession and exercises ownership, or that the conveyance of the goods contains a provision creating a trust in his favor; the first case as well as the second falls within the condemnation of the statutes.³ But secrecy would be evidence, in a case of doubt, in regard to the intent. Whether in the case of a conveyance of lands alone the fact that a trust or reservation in favor of the grantor appears on the face of the deed, could make a case of fraud upon creditors, within the meaning of the statutes, where the conveyance was otherwise good against them, may be doubted; unless indeed the terms or form of the trust were such as to indicate an intent to defraud.

In the case of a conveyance and delivery of property by a debtor, whether to a stranger or to a creditor, and without intent to defraud the alienor's creditors, a question may arise of the rights of creditors of the *alienee* as well as of creditors of the alienor; for the alienee may have taken subject to a trust or reservation in favor of the alienor, and the alienor may assert his claim against the other's creditors.⁴ But such a case will present nothing peculiar. For the purposes in

¹ See chapter 13, § 5.

² In some states such cases make

³ *Ib.* § 1. The distinction between only a *prima facie* presumption of the present subject and possession for fraud. See chapters 10 and 13. the purposes of possessory actions, like trespass, is there stated.

⁴ See end of chapter 16.

question this alienee is himself to be treated as an alienor, in that he has created, or permitted another to create, a trust out of his property; and hence the question to be considered will in effect be the one to which the statute refers,—it will be whether the trust has been created with intent to defraud creditors. We may therefore dismiss this question; and we are then left with the question of the rights of creditors of the alienor.

§ 2. WHAT IS MEANT BY TRUST.

What is an objectionable ‘trust’ or ‘reservation’ within the meaning of the law?

Something more, it is plain, is to be understood than a bare trust or confidence; it is not enough that a preferred creditor has agreed, whether openly or secretly, to do something in favor of his debtor in return for the preference;¹ nay, it is not enough that the creditor has agreed to do something ‘valuable’ in favor of the debtor. Performance of such agreement would not necessarily affect the rights of non-favored creditors.² The transaction must be a fraud in ‘intent’ upon these others; and if we have obtained a correct conception of fraud, there must be ‘endeavor to alter rights,’ as e. g. by impairing them. If, assuming the act in question to stand, the rights of the non-consenting creditors cannot be altered as by being impaired or unsettled, there is no fraud, and there is therefore no trust within the meaning of the law.

Indeed it appears to be insufficient to constitute a trust within the law under consideration that a valuable right has been reserved; the reservation of such a right may often be upheld without impairing the rights of other creditors. A trust reserved of the surplus, after the debts are all paid, in the case of a general assignment for creditors, is an obvious example; for such a trust would result by law.³ And there

¹ *Craft v. Bloom*, 59 Miss. 69.

² *Ib.*

³ *Johnston v. Zane*, 11 Gratt. 552;
Green v. Tanner, 8 Met. 411, 421;

are cases in which the reservation may include valuable rights actually covered by the credits; that is to say, rights which sooner or later must be turned in towards the payment of the debts. A debtor has the right to turn over to a particular creditor a security for the debt, so far as he may not be prohibited by the laws of preference, and require the return of any surplus.¹ Nor can it matter, in principle, what form the security, if it appear as *such*, may assume; enough that it is honest, even though there be in fact a purpose to defeat other creditors. The trust is not the object, or part of the object, of the transaction, which is the material fact.²

In so far indeed as the rights of a debtor are of a nature to work a delay of creditors, such rights may be reserved out of property assigned for creditors, without any imputation of intent to delay within the meaning of the statute of Elizabeth. An insolvent debtor assigned personalty, and all that should be realized from certain lands which had passed from him subject to a right of redemption, reserving his right to redeem the land and to take the rents and profits meantime. Creditors now impeached the assignment because of this reservation out of what was turned over to the assignees; but the court upheld it. Reserving what the law allowed to the debtor could not be evidence of an intent to delay creditors.³

Hempstead v. Johnston, 18 Ark. 123; *Miller v. Stetson*, 31 Ala. 161; post, pp. 276-280, where the subject is considered at length.

¹ *Carpenter v. Underwood*, 19 N. Y. 520; *Pearce v. Jackson*, 2 R. I. 35; *McClure v. Sheek*, 68 Texas, 426, 433, citing *Stiles v. Hill*, 62 Texas, 429; *Watterman v. Silberberg*, 67 Texas, 100. See *Parsell v. Patterson*, 47 Mich. 505.

² There is always a trust as to the surplus in a mortgage, but that will not affect the transaction, assuming that the amount of property covered by the mortgage is not grossly excessive. *God-*

chaux v. Milford, 26 Cal. 316. If the trust however were the object, or one of the objects, of the transaction, the case would be different. *Ib.* That is the meaning of the whole subject. See especially *Curtis v. Putnam*, 15 N. Y. 9, stated *infra*, p. 221. But it is only where the instrument itself appears to be a security, that an honest and rightful reservation, e. g. of the surplus in a mortgage, is not unlawful. See e. g. *Miller v. Stetson*, 32 Ala. 161; *Palmer v. Mason*, 42 Mich. 146. Further see note at end of this chapter.

³ *Dow v. Platner*, 16 N. Y. 562; *Roosevelt, J.*: 'The privilege of re-

The same would be true of a case in which an insolvent debtor turned over to one of his creditors a chose in action by way of security for the debt, and reserved the surplus to himself; the trust is not one of the objects of the transaction.¹

It does not necessarily make a trust within the prohibition of the law that some arrangement appears in the transaction by which the debtor may by possibility derive a benefit from it,² even though that benefit be something valuable out of the fund transferred to the creditor preferred. It may be necessary e. g. to provide for compensation to the debtor, out of the fund, for services to be performed by him in helping on

demption, like the privilege of preference, whether wise or unwise, is legal; and being legal, it cannot per se be fraud in law. It may, as it certainly does, delay creditors; but the legislature . . . created that delay.' See also *Green v. Tanner*, 8 Met. 411, 421.

¹ *Leitch v. Hollister*, 4 Comst. 211. Gardiner, J. : 'Neither the principle [in regard to trusts of the surplus in preferential assignments to trustees for creditors] to which I have adverted, nor the statute, applies to assignments made in good faith of a part of a debtor's property to creditors themselves for the purpose of securing particular demands. The conveyance, whatever may be its form, is in effect a mortgage of the property transferred. A trust as to the surplus results from the nature of the security, and is not the object, or one of the objects, of the assignment. The assignee does not acquire the entire legal and equitable interest in the property, subject to a trust, but a specific lien upon it. The residuary interest of the assignor may, according to its nature or that of the property, be reached by execution or by bill in equity. The creditor attaches that interest as the property of the debtor,

and is not obliged to postpone action until the determination of any trust.'

But this reasoning would be affected more or less by the conception of a mortgage in the particular state or country. By statute in New York and in many other states a mortgage creates no more than a lien in favor of the mortgagee; it gives no right of possession to him. At the English common law the case is very different; a legal estate, between the parties, is given to the mortgagee, with right of possession. In any view of a mortgage however an interest remains in the debtor until foreclosure. There is probably a distinction between an outright transfer of the entire title of the debtor, and a transfer which leaves in him an interest; in the former case a disappointed creditor could not reach any interest in the property, and would be delayed until the surplus appeared.

² Wood, V. C. in *Holmes v. Penney*, 3 Kay & J. 90. It has been held that a debtor may prefer his father's estate, in which he is interested as heir. *Brown v. Halsted*, 17 Abb. N. C. 197.

the adjustment of the various interests. The debtor may as well be paid as another; the management of the business for such purpose may be given to him;¹ only the arrangement should not be a cover for returning to the debtor what ought to go to his creditors.

The principle concerning the possibility of benefits to the debtor is however a dangerous one, and the fact may even be considered to have been exemplified by language used by the court in the very case in which the principle was recognized.² As an original question of principle it would really seem to be unnecessary to the successful impeachment of the transaction that the trust or reservation should be binding upon the creditor (or other) to whom the debtor has transferred his property. In principle it would seem to be enough that the instrument or the oral agreement of transfer should give a mere permission or a discretion to the favored creditor not subject to the courts,³ to pay over moneys or to make over other valuable benefits to the debtor out of the fund transferred. For it is obvious that such a permission might be used to the detriment of the other creditors; indeed wherever creditors' rights were not already cut down by law, any use of it would be to their detriment in a legal sense if they did not consent, however well-intended the act and however prudent it might be, for it would be assisting the debtor to evade or at least to postpone the payment of debts which were due. And an authority given to do a wrongful act shows the 'intent' of the statute equally with an obligation imposed.⁴

¹ *Crow v. Red River Bank*, 52 Texas, 362.

² The principle was not stated in terms. The court said: 'The distinction is too thin to authorize the court to decide that because the settlor may possibly derive some benefit from it, the settlement must therefore be fraudulent.'

³ That is the test of the New York courts. See *Benedict v. Huntington*,

32 N. Y. 219; *Robbins v. Butcher*, 104 N. Y. 575.

⁴ This is shown by cases in which it is held that to give authority to an assignee, under an assignment for creditors, to extend the time of payment of the assignor's debts, or, what is the same thing, to sell his property on credit, vitiates the assignment. *Brigham v. Tillinghast*, 13 N. Y. 215; *Kellogg v.*

Nay, assuming e. g. the case of dividends of non-assenting creditors payable, by the terms of the assignment, to the debtor, a permission or discretionary trust in the trustee, beyond the control of the courts, is worse than a binding trust.¹ In the latter case a debt is created against the trustee in favor of the debtor, as soon as the dividend is declared; and that debt can be reached by the non-assenting creditors by ordinary processes of law; the creditors are only delayed for a time. In the former case these creditors are at the mercy of the trustee, if the transaction is allowed to stand; they cannot compel the trustee to make over to the debtor the forfeited dividends or to declare them due to him, since the trustee has an independent discretion. They are therefore hindered and kept in the dark, and likely to be defeated altogether in obtaining payment of what was all along due to them equally with the favored creditors. No provision is more objectionable than one which leaves the operation of the trust open or takes it out of the hands of the courts; in either case the rights of the non-assenting creditors are set aside,² assuming that their rights have not

Slanson, 11 N. Y. 202. But this rule does not prevail in all the states, as will be seen in a later chapter. It matters not that the event is improbable, or that the act proposed turns out impracticable entirely. It is not the directness of the provision, but the purpose shown by it that affords the test. *Collomb v. Caldwell*, 16 N. Y. 484; *Leitch v. Hollister*, 4 Comst. 211. In the latter case the court, speaking of a provision for the return of a surplus, in a preferential assignment, said: 'The creation of the trust shows that a surplus was in contemplation of the parties, and a reservation for the benefit of the assignor is a fraud upon creditors which is consummated the moment the deed containing the provision is executed and

delivered.' That is, the provision shows the 'intent' of the statute; the statute requires only the 'intent,' not the accomplishment of the intent. But in those states in which the debtor has by law the right to insert the particular provision in his deed, its presence there cannot show any fraudulent intent.

¹ That is a binding trust simpliciter; other provisions might be added to it which would make it as bad as anything could be, as in *Spencer v. Slater*, 4 Q.B. D. 13.

² Upon this subject see *Wakeman v. Grover*, 11 Wend. 187; s. o. 4 Paige, 23; *Jessup v. Hulse*, 21 N. Y. 168; cases specially considered in later chapters.

already been abridged in the matter by statute or by adjudication. But all this is but the preliminary and general statement of what will appear again and again in certain very special forms, too special for the purposes of this chapter.¹

Provisions for the speedy settlement of claims in favor of the debtor are not to be treated as reservations for his benefit. This is a getting in of the estate as soon as possible, not a delay of creditors. Thus in a New York case² an assignment by a debtor for creditors had given authority to the assignees to make compositions with the assignor's own debtors in regard to doubtful claims, in the exercise of a sound discretion; and this was held not to invalidate the assignment. The provision could in no sense be treated as a reservation in favor of the debtor, except in the lawful sense of paying his debts as fast as possible.³ Moreover such a discretion would not be beyond the control of the courts, according to New York law.⁴

Partnership assignments with reservations may also stand upon a special footing because of the difference between the rights of partnership creditors and rights of creditors of the individual members. While on the one hand, a provision for returning partnership property to the debtors, before all partnership debts are paid, will, according to New York law, avoid an assignment in favor of partnership creditors, because the law postpones the private to the partnership creditors in respect of such property; on the other hand it seems that an assignment of partnership and also of individual funds, for the payment of partnership debts only, with

¹ A very special case of discretionary trusts is treated of in the next chapter, to wit, the case of a mortgage of goods in trade with power of sale in the mortgagor; the power in most cases is absolute.

² *Dow v. Platner*, 16 N. Y. 562.

³ 'Instead of nursing the estate by delay, so as to enhance the probability

of a surplus for his benefit,' compositions 'tend to a more speedy realization, at the expense of a possible sacrifice, to some extent, of his interests.' Roosevelt, J.

⁴ *Comp. Benedict v. Huntington*, 32 N. Y. 219; *Robbins v. Butcher*, 104 N. Y. 575.

a provision for return of the surplus, will also be invalid. The individual property should be left out, or provision made for the private creditors without reservation except on payment of all debts.

The following case¹ will serve for illustration: G C and J W C, partners, being insolvent both as a partnership and individually, assigned their partnership personalty, together with certain real estate, which they owned as tenants in common, to the defendants, in trust to pay the debts of the partnership in a certain order, with a reservation to the debtors of the surplus if any there should be. The plaintiffs, creditors of G C, having obtained judgment, insisted that the assignment was void against them because of the reservation; and this contention was sustained by the court. It was said that the reservation might not have vitiated the assignment if the fund to which it attached had consisted of partnership property only; but the real property held by the debtors in common was individual property, and should not have been put into the trust with a reservation, leaving out the private creditors.²

Again a trust for the return of a surplus is lawful where the debtor, being perfectly solvent, turns over to or for certain of his creditors part of his property, retaining enough in his hands to satisfy all other creditors; they cannot be hindered by the transaction. Thus in a recent case³ a deed was executed by a solvent debtor of part of his property to trustees to pay certain of his creditors; the deed containing a provision that the surplus, after the execution of the objects of the deed, should be returned to him, instead of being paid over to other creditors. The provision would clearly have been

¹ *Collomb v. Caldwell*, 16 N. Y. 484. Hun, 411; *Kayser v. Heavenrich*, 5

² Preference in a partnership assignment, of a member of the partnership is fraudulent if the assignors may derive a benefit. *Welsh v. Britton*, 55 Texas, 118; *First National Bank v. Wood*, 45

Kans. 324. But see *Fanshawe v. Lane*, 16 Abb. Pr. 71. *Comp. Wilson v. Robertson*, 21 N. Y. 587; *Haynes v. Brooks*, 115 N. Y. 487.

³ *Knapp v. McGowan*, 96 N. Y. 75.

invalid against the non-favored creditors had the debtor, apart from the property transferred, been insolvent, or had he been made insolvent by the transaction;¹ but he was still solvent after the transfer, and the court held that the non-favored creditors could not upset the transaction.²

Again a trust in favor of a debtor is not obnoxious to the statute when it is part of a general transaction for the performance of some active and proper duty in the carrying on of some business or enterprise as distinguished from a mere scheme for the payment or securing of debts; at all events where the interests reserved or to revert are incidental and partial; in a word where the purpose, or some part of the purpose, is not to protect a debtor's property from his creditors.³ A trust and banking company executed deeds which made over to trustees securities for bonds issued by the company. Accord-

¹ See *Van Nest v. Yoe*, 1 Sandf. Ch. 4; *Planck v. Schermerhorn*, 3 Barb. Ch. 644, 646; *Gardner v. Commercial Bank*, 95 Ill. 298; *Gardner v. Commercial Bank*, 13 R. I. 155, 167.

So a stipulation for a release in an assignment by an insolvent debtor invalidates the assignment against those who do not consent, unless the debtor has turned over all his property. In *re Wilson*, 4 Barr, 430; *Thomas v. Jenks*, 5 Rawle, 221; *Hennessey v. Western Bank*, 6 Watts & S. 300; *Quarles v. Kerr*, 14 Gratt. 48. But if all his property is turned over, secus in many states. *Ib.*; *Brashear v. West*, 7 Peters, 615; *Skipwith v. Cunningham*, 8 Leigh, 271; *Phippen v. Durham*, 8 Gratt. 457.

'The distinction between a partial and a total surrender grows out of the statute which forbids only fraudulent conveyances of present property but is silent as to property acquired in the future. See *Thomes v. Jenks*, 5 Rawle, 221.' *Samuels, J. in Quarles v. Kerr, supra.*

This subject will be considered later, in the text, with some minuteness.

² *Earl, J.*: 'If *Roche* [the debtor] at the time of the execution of the trust deed to *McGowan* had been insolvent, and had conveyed substantially all his property by that deed, a different question would have been presented . . . An insolvent and even a solvent debtor cannot convey all his property to trustees to pay a portion of creditors, with a provision that the surplus shall be returned to him, leaving his other creditors unprovided for, because such a conveyance ties up his property in the hands of his trustees, places it beyond the reach of creditors by the ordinary process of law, and thus hinders and delays them.' *Knapp v. McGowan, supra.*

³ *Curtis v. Putnam*, 15 N. Y. 9; *Reynolds v. Crook*, 31 Ala. 634; *Godchaux v. Milford*, 26 Cal. 316, mortgage of property, the surplus of which becomes a trust for the mortgagor, the mortgage not being excessive.

ing to the terms of the deeds the bonds were to be sold abroad, and the trustees were empowered to receive moneys from various sources, and to make investments therewith to secure payment of the bond-holders. On default they were empowered 'to borrow money upon and sell and dispose of said' securities; until default they were to pay to the company the interest that should become due thereon. The deeds further provided for the repayment to the company of such surplus as might remain in the hands of the trustees after final payment of the bond-holders. The deeds were upheld.¹

It may be that a trust in favor of the debtor may operate as a positive gain to the creditors; and the question will then arise whether creditors who object can invalidate the transaction. In principle it would seem to make no difference whether the transaction was detrimental or beneficial to creditors; *they* are to judge of that. The true question simply is, not whether creditors are delayed, but whether there is an intent to delay or defeat them,—that is, where the subject matter affected by the trust is something which creditors could reach. If however the subject of the trust could not have been reached by them in any way before, and now by the trust it has been brought within the reach of legal process, they cannot complain; in regard to exempt property intent to defraud is nothing.² Thus where a debtor assigned property to a creditor of his, stipulating for the employment by the creditor of the debtor's apprentices, their wages to be paid to the debtor, the assignment was upheld against other creditors, on the ground that the labor of the apprentices could not otherwise have been reached.³

¹ *Curtis v. Putnam*, supra. They were not void either within 2 R. S. 135, § 1, declaring against conveyances of personalty in trust for the grantor, or as made with intent to delay creditors. See also *Camp v. Thompson*, 25 Minn. 175.

² Ante, pp. 51 et seq.

³ *Faunce v. Lesley*, 6 Barr, 121. Another reason given was that the agreement was collateral to the assignment. Sed qu. In Pennsylvania however exempt property conveyed away by a debtor with intent to defraud his creditors is thereby brought within their reach. Ante, p. 55.

The same is true of 'spendthrift trusts,' so called. So far as the terms of the statute of Elizabeth, as commonly construed, are concerned, a trust may be created for a debtor by a third person out of the latter's property, or out of any property in which the debtor has no interest, by which a provision is made for the debtor which his creditors cannot reach.¹ Such a transaction could not be treated as an alienation made with intent to defraud creditors, — other than those of the grantor; nor would such a transaction be contrary to any other law if it were provided that upon the bankruptcy of the debtor (*cestui que trust*) or of an attempt by him to alienate the trust estate, the same shall cease or go over to some one else named or described.²

Indeed it is held by some of our courts that a third person may create a trust in property for a debtor (if the debtor had no interest in the property), which, together with the income, shall be exempt from the creditors of the *cestui que trust*, even though no provision is made that the estate shall cease or go over to another upon attempted alienation or upon the insolvency of the beneficiary; the beneficiary having the benefit of the trust against his creditors whatever befalls.³ This

¹ The objection to such a transaction might perhaps be pressed, under the statute of Elizabeth; but the statute is generally understood to apply only to alienations of some interest of the debtor. The true ground of objection to such transactions as that of the text is their general deceptive tendency. See *infra*, p. 223, note. It is virtually a fraud, but a fraud of the common law.

² See *Brandon v. Robinson*, 18 Ves. 429.

³ *Holdship v. Patterson*, 7 Watts, 547; *Shankland's Appeal*, 47 Penn. St. 113; *Rife v. Geyer*, 59 Penn. St. 393; *White v. White*, 30 Vt. 338; *Pope v. Elliott*, 8 B. Mon. 56; *Nichols v. Eaton*, 91 U. S. 716; *Hyde v. Woods*,

94 U. S. 523; *Broadway Bank v. Adams*, 133 Mass. 170; *Foster v. Foster*, *ib.* 179; *Pacific Bank v. Windram*, *ib.* 175, 176. It matters not whether the provision is discretionary, as in *Foster v. Foster*, or absolute, as in *Broadway Bank v. Adams*.

By statute in New York a trust may be created for the support of a person, which shall be good against the beneficiary's creditors to the amount necessary for such support. R. S. part 2, c. 1, tit. 2, art. 2, §§ 57, 63. Creditors can reach anything beyond such amount. *Williams v. Thorn*, 70 N. Y. 270. Further see *Cutting v. Cutting*, 86 N. Y. 546; *Tolles v. Wood*, 99 N. Y. 616; *Spindle v. Shreve*, 111 U. S. 546.

is contrary however to the doctrine of other of our courts,¹ it is contrary to the English authorities,² and it is strongly and justly criticised by text-writers.³ But it is enough here to say that the question falls without the statute of Eliz-

¹ *Tillinghast v. Bradford*, 5 R. I. 205; *Heath v. Bishop*, 4 Rich. Eq. 46; *Dick v. Pitchford*, 1 Dev. & B. Eq. 480; *Mebane v. Mebane*, 4 Ired. Eq. 131.

² *Brandon v. Robinson*, 18 Ves. 429 (the leading case, decided by Lord Eldon, and followed in the cases last cited); *Green v. Spicer*, 1 Russ. & M. 395; *Rochford v. Hackman*, 9 Hare, 475; *Trappes v. Meredith*, L. R. 9 Eq. 229; *Snowdon v. Dales*, 6 Sim. 524; *Rippon v. Norton*, 2 Beav. 63. The foregoing are cited in *Broadway Bank v. Adams*, 133 Mass. 170, 172. See also the cases reviewed in *Sparhawk v. Cloon*, 125 Mass. 263, and in *Nichols v. Eaton*, 91 U. S. 716.

³ *Gray, Restraints on Alienation*, §§ 166, 250 et seq.; *Wait, Fraudulent Conv.* §§ 361 et seq. The current was set wrong in Pennsylvania (*Holdship v. Patterson*, 7 Watts, 547), and that is strange in view of what the court of that state has from the first declared in regard to deceptive appearances in cases under the statute of Elizabeth. The mischief of retaining possession, it was said in that state as long ago as in 1826, is that 'a false credit is given.' *Martin v. Mathiot*, 14 Serg. & R. 214, *Tilghman*, C. J. And the courts of that state treat the case of possession retained as making a case of fraud as matter of law, and that not because of any deception in fact (*Martin v. Mathiot*, supra), but because the act amounts to holding out a false credit, and so has a deceptive tendency. It would be difficult to say that the case of the trust in question was not such a holding out,

though it is not within the statute of Elizabeth unless the trust was created out of the beneficiary's property. The mischief of the doctrine is precisely the same as that of retaining possession after a sale; and it is no sufficient answer to say, as was said in *Broadway Bank v. Adams*, 133 Mass. 170, 173, that by going to the registry of deeds (the trust there was by deed) or of wills (in *Foster v. Foster*, 133 Mass. 179, the trust was created by will) the facts can be ascertained. That cannot be done with every transaction on credit. The rule opens the way to fraud; a way already made too easy by lax views of the rights of creditors.

Moreover in attempting to exempt property from liability for debt the founder of the trust is assuming a function of state; he might as well be permitted to exempt the property in an outright gift as to do so through a trust. He avoids a technical objection by putting the exempted gift into the form of a trust (*Broadway Bank v. Adams*, 133 Mass. 170, 172); but he also circumvents the fundamental principle that the state alone can exempt property.

But so far have creditors' rights touching fraudulent conveyances been abridged (by adjudication) in Massachusetts that it is by no means clear that the debtor himself could not create a trust out of his own property, in favor of himself in part, provided he gave the entire control of the property to his trustee, making the desired benefit to himself a matter of discretion with the trustee.

abeth, and has no bearing upon attempts, direct or indirect, by a debtor to create a trust for himself out of property in which he has an interest. Such a case, whenever it would tend to hinder, delay, or defraud his creditors, if it were allowed to stand, is directly within the condemnation of the law,¹ whether of the statute of Elizabeth or of some special statute relating to trusts;² except in the case of trusts for married women, at the common law.³

Finally, to be obnoxious to the statutes on the footing of *trust*, the trust must be in favor of the debtor-alienor. It will be in his favor if he is even indirectly to have the actual benefit of the property. Thus where a man conveys his property to his son upon consideration that his son shall support him, the transaction, by the better view, amounts to a conveyance upon trust for the grantor.⁴ But where he conveys in trust for his family or of some part of his family, and is not in reality to receive the benefit or a part of the benefit so set apart, the trust is not in his favor; and the validity of the transaction will then turn upon other considerations, as e. g. whether it is for value and without notice,⁵ or, if voluntary, whether he has ample means remaining to satisfy his creditors.

¹ *Pacific Bank v. Windram*, 133 Mass. 175; *Johnston v. Harvy*, 2 Penn. 82; *Mackason's Appeal*, 42 Penn. St. 330. 'It is true,' said the court in *Pacific Bank v. Windram*, 'that a man who is not indebted may, by a voluntary conveyance made in good faith, transfer his property so as to put it out of the reach of future creditors. When a man transfers a trust fund, of which the income is to be paid to him during his life, and the principal at his death to be paid or transferred to others, the principal may be beyond the reach of his future creditors; but we are of opinion that his right to the income which he retains in himself may be alienated by him, is

liable for his debts, and may be reached in equity.'

² See ante, p. 208, note.

³ *Parkes v. White*, 11 Ves. 209; *Jackson v. Hobhouse*, 2 Merid. 483; *Woodmeston v. Walker*, 2 Russ. & M. 197; *Pacific Bank v. Windram*, 133 Mass. 175, 177. The exception is removed by recent legislation in many states. See the last case cited for Massachusetts law. And upon the whole subject see Gray, *Restraints on Alienation*, passim.

⁴ Chapter 18, § 5.

⁵ *Holmes v. Penney*, 3 Kay & J. 90. See also *Ex parte Eyre*, 44 L. T. 922, where A sold property to his father B for value, and B thereupon settled it, as

The grounds upon which the foregoing 'trusts' or 'reservations' are deemed to fall without the category of fraudulent conveyances will serve to indicate the principle which governs those which the law condemns. In none of the cases presented is there any indication of personal intent to defraud; in none of them is there any interference with the rights of creditors in the way of altering or impairing the same. The converse of this latter suggestion (of personal intent one need only say 'res ipsa loquitur') will, it is believed, furnish the cardinal rule in regard to trusts which fall within the prohibition of the law; and that rule may be stated thus:—

Any alienation directly or indirectly made by a debtor, whether individual, firm, or corporation,¹ with a view, or subject, to a trust, reservation, or benefit in his own behalf, which alienation and trust, if allowed to prevail, would have the effect to alter or impair the rights of his creditors as they exist by the law of the state in which the credit was given (where the law of another state was not contemplated), is made with intent to hinder, delay, or defraud creditors; and the same is invalid against the creditors, though the alienee was a purchaser for value. Or the rule may be put thus: If an alienation by a debtor contain a provision for the debtor which, if allowed to prevail, would impair the rights of his creditors, that alienation is made with intent to hinder, delay, or defraud his creditors; and the same, etc.²

he might do, upon A and his family, on the terms that it should go to his wife and children in case of A's bankruptcy; *Thompson v. Webster*, 7 Jur. N. S. 581.

¹ *Globe Ins. Co. v. Thacher*, 87 Ala. 458.

² For special cases of trust or in the nature of trust see *Neale v. Day*, 28 L. J. Ch. 45; *In re Pearson*, 3 Ch. D. 807; *Ware v. Gardner*, L. R. 7 Eq. 317; *Ex parte Games*, 12 Ch. D. 314, *Thesiger*, L. J.; *Holmes v. Penney*, 3 Kay & J. 90;

Gordon v. Clapp, 113 Mass. 335; *Merwin v. Richardson*, 52 Conn. 223; *Mitchell v. Sawyer*, 115 Ill. 650, *Gordon v. Reynolds*, 114 Ill. 118; *Moore v. Wood*, 100 Ill. 451; *Powers v. Alston*, 93 Ill. 587; *Tunison v. Chamblin*, 88 Ill. 378; *Woodward v. Solomon*, 7 Ga. 246; *Renfro v. Goetter*, 78 Ala. 311; *Life Ins. Co. v. Pettway*, 24 Ala. 544; *Coker v. Shropshire*, 59 Ala. 542, deed of trust by guardian reserving right of possession until the ward's arrival of age sustained; *Crawford v. Kirksey*, 55 Ala.

This rule is the general deduction to be drawn from authorities relating to a great variety of special cases, in which only special rules have been laid down. No court has, so far as we are aware, given a broad definition or declared a broad rule of law touching the whole subject of trusts and reservations, except in so far as the offhand declaration, that trusts and reservations on behalf of the alienor in a conveyance by a debtor are fraudulent, may be considered such; and the justification of the foregoing rule, laid down as it is with a view to precision, remains to be fully established by a patient examination of the many aspects of the subject. To such examination the following pages will be directed.

One or two important preliminary observations should be made: As the foregoing rule suggests, the rights of creditors differ more or less in different states; in some states creditors' rights touching conveyances by their debtors have become considerably abridged, and debtors' rights enlarged, either by the decisions of the courts or by legislation, and whatever doubts there may be, and they will often be very serious, concerning the reasons for this, the credits are given subject to them. That is to say, creditors cannot object to acts done by their debtors in such cases upon the footing that their rights are impaired, for the supposed rights have no existence in the law. For example, a creditor under New York law finds that his rights are invaded by his debtor's mortgaging his stock of goods in trade with a reservation to himself of possession and power of user on his own behalf;

282; *Reynolds v. Crook*, 31 Ala. 634; property of the debtor in discharge of
Montgomery v. Kirksey, 26 Ala. 172; the debt and paying the debtor in cash
Eigenbrun v. Smith, 98 N. Car. 207; for the excess in value of property over
citing *Frank v. Robinson*, 96 N. Car. the debt. *Rankin v. Vanbiver*, 78 Ala.
28, that a provision in an assignment 562. In Texas however such a case
for creditors that the debtor shall be with knowledge of the situation on the
employed at a certain salary is evidence part of the creditor, is deemed to bring
of fraud. the whole transaction within the statute.

A case of benefit or trust for the *Black v. Vaughan*, 70 Texas, 47; Op-
debtor is not made by a creditor's taking *penheimer v. Halff*, 68 Texas, 409.

whereas this rule never existed or has been abridged in Massachusetts, and the creditor gives his credit in such cases upon a narrower basis,—he cannot treat such a mortgage as necessarily fraudulent because his right is not absolute. But if the debtor's alienation, with its trust or reservation, goes far enough to invade the creditor's actual rights by the law of Massachusetts, the fraudulent intent of the statute is made out. So, in New York, creditors' rights are by law larger in respect of discretionary trusts in favor of the debtor than in England; a trust of the kind which would invade creditors' rights under New York law would not invade them under English law. But as soon as the line is crossed, the result is the same in England as in New York,—the 'intent' of the statute of Elizabeth is established. And this is true everywhere. The result is, that there is no divergence of law about the principle of fraudulent intent under the statute; the divergence is in regard to the extent of the creditors' rights. This, it is believed, is a matter of first importance in dealing with the term fraud.¹

¹ So far as we know, this has not before been pointed out; and the consequence has been that merely seeming conflicts in regard to the fraudulent intent of the statute of Elizabeth and its followers in this country have been multiplied, to the serious confusion of legal conceptions, and so to the misleading of the profession. The mistake is however a very natural one. Thus in one state a partial assignment by a debtor for his creditors, with a provision for a return of surplus, is declared to be a fraudulent conveyance; in another state the same sort of transaction is declared not to be fraudulent; and it is right enough to say that in each state; but when the two rules of law are set down side by side, it is said that there is a conflict of views concerning what constitutes fraud, or a fraudulent intent,

while the truth is that the *rights* of creditors are different in the two states. In one of the states the creditors have by law a broad right, and a single step by the debtor may invade it; in the other the creditors' rights are narrower, and the single step would not take the debtor over the line. But if in this second case the debtor goes far enough, though without any personal intent to defraud, he will cross the line, and then the fraudulent intent will be made out as in the first case. It is not a mere question of words therefore to say that the laws differ in regard to creditor's rights rather than in regard to what constitutes 'intent' to defraud. There can be no fraud unless a right has been invaded; hence the first question, whatever form of words is used, is of the existence of the right.

Another observation, which follows from (or perhaps is only another way of stating) what has just been said: The rule above laid down is silent in regard to presumptive intent; it does not say that the debtor's act in creating the trust or in reserving the benefit is, in some states, *prima facie* fraudulent. It declares that when the creditor's rights are impaired, the intent is made out, and that is true whatever language, from convenience or usage, is employed; whenever the debtor crosses the line, wherever it is, of the rights of his creditors, he is guilty of fraud. That line may be fixed absolutely, or it may be fixed subject to a qualification; there is a boundary as well in the latter case as in the former. If the facts making the qualification are shown, the line is not crossed, and the intent is wanting; if those facts are not shown, the contrary is true.

It is correct therefore to state the rule in the language of the rights of creditors. And it is desirable to do so, because to state it in the language of presumption, as is usually done, is very apt to be misleading.¹ When it is said that in one state a particular act of the debtor is held to be absolutely fraudulent, while in another state it is said that the same act would be only *prima facie* fraudulent, an impression is apt to be conveyed that different conceptions of fraud are held in the two states; while the truth is that there is only a difference in the extent of the debtor's rights. The act complained of was an absolute invasion of the creditor's rights in the one state; in the other state it would only be an apparent invasion. In this other state the debtor can show that what seems at first to be true is not true; he has not in reality invaded the creditors' rights as they exist in that state. Nor indeed, when it is said that a particular act raises a *prima facie* presumption of fraud, is it meant that the act in itself alone is equivocal;

¹ Rightly understood, the rule when stated in the language of presumption is without objection; and it is convenient so to state it. But it is quite as convenient to state the rule in a way not to be misunderstood.

the meaning is that that act, considered by itself, establishes fraud, but that it is capable of being explained by facts which will remove the taint. The act in itself is of the same import as where it is pronounced fraudulent per se.¹

¹ The subject of the foregoing chapter runs back not only through the old conveyances to uses, of the time before the Statute of Uses, but to the earliest conveyances in mortmain, and indeed through the period of gifts in 'commutation.' A case of special interest, in mortmain, touching the subject of the foregoing chapter, may here be given. It is from Maitland's Pleas of the Crown for Gloucester, p. 12, pl. 50, anno 1221 :—

Item juratores dicunt quod tenentes domini Regis in villa sua qui tenent i. mesuagium vel gardinum vel hujusmodi

de domipo Rege reddendo inde redditum domino Regi veniunt et vendunt de tenementis illis hospitalariis et monachis *et iterum ea resumunt tenenda de eis* unde non possunt distringi ad faciendum quod facere debent sicut alii tenentes, sicut de pane et cervisia et hujusmodi, quia monarchi et hospitalarii statim excommunicant vicecomitem [the sheriff] et ballivos suos et ballivos domini Regis. Et ideo preceptum est vicecomiti quod si aliquis decetero vendat ita tenementa domini Regis quod capiat illud in manum domini Regis et salvo custodiatur quousque, etc.

CHAPTER X.

INTENT TO DEFRAUD CONTINUED: TRUSTS IN MORTGAGES OF MERCHANDISE.

How are trusts and reservations, which are capable of being treated as obnoxious to law, regarded? Do they establish the 'intent' of the statute, or are they only presumptive evidence of it? Unfortunately the rights of creditor and debtor respectively differ in different states, and the answers given by the authorities could not be in harmony; indeed the authorities of the same state are not always in harmony. Three different doctrines, not to mention some slight variations from all, have obtained in different parts of the United States, which may be severally called for convenience, and with regard to chronology, the Virginia, the New Hampshire, and the Massachusetts doctrines; though at the outset the Virginia doctrine did not differ from the New Hampshire, and does not materially differ from it now in regard to the class of cases first to be considered.

The subject first to be considered is mortgages of goods in trade.¹ In these cases it sometimes happens that the mortgage (or other like instrument) provides in terms that the mortgagor may retain possession and sell the goods in the usual course of business; sometimes it happens that a contemporaneous agreement of the kind is proved outside of the

¹ Upon this subject the reader will find a series of discussions in the Southern Law Review. 2 S. L. R. 781, by J. O. Pierce; 5 S. L. R. 617, by L. A. Jones; 6 S. L. R. 96, Pierce, again; 7 S. L. R. 95, Jones; ib. 205, E. J. Maxwell. See also Wait, Fraudulent Conveyances, Chap. 22; Jones, Chattel Mortgages, Chap. 9.

mortgage ; sometimes the only fact certainly disclosed is that the mortgagor has continued the business after the mortgage as before. For ordinary purposes these three aspects of the subject may be treated as one ; but for some purposes it will be necessary, before dismissing the subject, to treat them separately.

One preliminary observation should be made ; the questions for consideration are complicated somewhat by the fact of possession being retained by the mortgagor. This may be treated however as an accidental condition to the enjoyment of the benefit, and eliminated as far as possible from the question. The real subject of consideration is the effect of the reservation or stipulation in favor of the debtor apart from his possession ; retaining possession being a subject by itself for later consideration.

The Virginia doctrine above referred to was laid down in a decision¹ much cited, of the year 1825. The case in short arose upon a deed of trust by a debtor conveying to a creditor of his a stock of goods in trade. The deed, which was executed in March, 1819, provided that in the following July the debtor should pay one third of the debt, in November of the same year another third, and in January, 1820, the rest. And it was covenanted that the goods should remain in the debtor's possession, and that he should have power to make sales of them, accounting with the trustee if called upon.² It was held that the provision touching sales rendered the deed fraudulent and void against other creditors, as a matter of law.

The ground taken by the court was that with such a provision the deed was *felo de se* ; it contained the means of its own defeat. The power of sale was 'completely adequate to the destruction of the avowed purpose of the deed.' What ap-

¹ *Lang v. Lee*, 3 Rand. 410.

² The question whether the mortgage or like instrument covers after-acquired

goods is a question of the sufficiency of the instrument, not of fraud.

peared at first to be a security upon property was no security upon property; the whole matter was resolved into the personal undertaking of the debtor,¹ that is, the case, so far, stood as it stood before the deed was executed. It followed that the deed must have been executed for the purpose of delaying and defrauding creditors.²

All that is peculiar in the Virginia law upon this subject has grown out of the expression 'adequate to the destruction of the avowed purpose of the deed,' in the foregoing case. What was merely dwelt upon as a plain fact in that case, and only dwelt upon as conclusive of a fraudulent intent, has in later cases in the same state and, by inheritance, in West Virginia, been looked upon as a limiting condition; and the courts have accordingly laid it down for settled law that an instrument, intended as a security or as a conveyance for the benefit of creditors, is valid if it does not contain any provision 'adequate to its own defeat.'³ And under the rule as thus interpreted it is directly avowed, though not without regret, that the debtor may alter and impair the rights of his creditors under the statute against fraudulent conveyances, if only the instrument is consistent with itself in its object of transferring the property from the debtor to the creditor.

¹ Ryall v. Rolle, 1 Atk. 165.

² Mr. Justice Carr: 'Now I ask what possible security could the deed furnish encumbered with a stipulation like this? Is it not completely a *felo de se*? . . . Now can we imagine a power more completely adequate to the destruction of the avowed purpose of the deed than that retained by the grantor in this case? . . . He is to account though, if called on. But is this more than a personal accountability? The goods are gone. You cannot follow them. The money received for them has no earmark . . . What are you then,

after all, but a general creditor?' And Ryall v. Rolle, 1 Atk. 165, was referred to as analogous, where it was laid down that if in a conditional sale there is no delivery, the buyer 'confides in the credit of the vendor and not in any real or particular security.'

³ Marks v. Hill, 15 Gratt. 400. This differs from the general rule that the debtor may be allowed to sell for the benefit of the mortgagee (post, p. 265) in that by the Virginia rule the creditors may be put off by the deed for a term of years, if definitely specified.

This rule saves in particular one large class of transfers by debtors, containing objectionable features, to which attention will be given hereafter, to wit, general assignments for creditors with postponement of payment. It will save this class of cases even when the deed of assignment covers a stock of goods in trade, with power of sale and disposal in the debtor, if the further continuance of the business by him is for the purpose of realizing the funds with a view to winding the business within a time specified.¹ The rule does not save cases in which there is a power of sale merely for the benefit of the debtor; such power would be held equivalent to a power of revocation of the deed, that is, it would be adequate to the defeat of the avowed purpose of the instrument.²

The New Hampshire doctrine was established in a case³ decided in the year 1826. That was an action of trespass for taking away goods. S, an innkeeper, being owner of the goods and indebted to his brother-in-law D in a sum greater than their value, sold them to D in part payment of the debt. After the sale, but before the goods were removed, it was agreed between S and D that the property, which consisted of household furniture, should be left and used in the tavern. But in order to secure the goods from being taken by other creditors of S, who was insolvent, D made a lease of the goods to the plaintiff, a man in the employ of S, for six months. The arrangement was made to enable S and his family to have the use of the goods, though that was no part of the contract of sale. A verdict was directed for the defendant, and the court now sustained the direction. The rule declared was that possession and use by the vendor after sale were al-

¹ See chap. 12.

² *Saunders v. Waggoner*, 82 Va. 316; *Wray v. Davenport*, 79 Va. 19; *McCormick v. Atkinson*, 78 Va. 8; *Williams v. Lord*, 75 Va. 390; *Addington v. Etheridge*, 12 Gratt. 436; *Sheppard v. Turpin*, 3 Gratt. 373; *Kuhn v. Mack*, 4 W. Va. 186; *Garden v. Bodwing*, 9

W. Va. 121; *Gardner v. Johnston*, ib. 403. A power of revocation has been held fatal from the time of *Twyne's Case*, 3 Coke, 80. The st. 27 Eliz. c. 4, § 5, contains an express provision of the kind. See chap. 20.

³ *Coburn v. Pickering*, 3 N. H. 415.

ways *prima facie* evidence of a *trust*, and conclusive evidence if not explained; and then, the trust being established, fraud was an inference of law which the court was bound to pronounce;¹ the trust was inconsistent with the purpose of a mortgage,² and creditors' rights therefore were invaded.

A similar question arose again in the same state in the year 1845, in a case³ relating to a mortgage of a stock of goods in trade. The mortgage, given by a manufacturer, covered certain manufactured goods and all the stock on hand, to secure payment of a debt due the mortgagee; and it stipulated that the mortgagor should continue to manufacture as usual from the stock, sell the goods made, and appropriate the proceeds to his own use, not accounting to the mortgagee but agreeing to keep on hand for the mortgagee a supply equal in value to the value of the mortgaged property. It was held that the mortgage was fraudulent against subsequent creditors, as matter of law.⁴ And the same was held again of a case⁵ in which a stock of goods in a country store had been mortgaged, upon a verbal agreement that the mortgagor should continue in

¹ Richardson, C. J.: 'Possession and use by the vendor after the sale is always *prima facie*, and, if unexplained, conclusive of a secret trust. It is therefore very clear that fraud is sometimes a question of fact and sometimes a question of law. When the question is, was there a secret trust? it is a question of fact. But when the fact of a secret trust is admitted or in any way established, the fraud is an inference of law which a court is bound to pronounce.' See *Wilson v. Sullivan*, 58 N. H. 260, 265; *Parker v. Marvell*, 60 N. H. 30.

² Bellows, C. J. in *Putnam v. Osgood*, 51 N. H. 192, 202. Generally, where a 'mortgage' looks to the protection of the mortgagor and mortgagee from other creditors, the instrument is fraudulent towards them, being no proper mortgage. *Renfro v. Goetter*, 78 Ala. 311.

³ *Ranlett v. Blodgett*, 17 N. H. 298.

⁴ The Massachusetts authorities, to be referred to later, were rejected, and the rule in *Coburn v. Pickering*, 3 N. H. 415, followed. As to the after-acquired goods the court, by Parker, C. J. said: 'We cannot hold that the property purchased with the avails of the mortgaged property sold would be within the mortgage by substitution. If that were so, how are creditors to ascertain what is within the mortgage and what is not? And if it could be held that the after-purchased property was substituted, so that the mortgage would cover it, the same power of sale and of substituted ownership would still exist and be applicable to that also.'

⁵ *Putnam v. Osgood*, 51 N. H. 192; s. c. 52 N. H. 148.

possession and sell the goods as before, for his own benefit, though the mortgagee retained the right to take possession at any time. The mortgage was declared fraudulent per se, regardless of any actual intent to defraud.¹

Nor has the law been changed in this respect by a statute which, enlarging the mortgagor's rights, permits him to sell the mortgaged goods where the consent of the mortgagee is signified in writing and duly recorded.² The statute is quite broad; it makes no restriction of property except that it shall be personal. 'It may be a single chattel or a stock of goods in a retail store; and the law does not require that the written consent should express the stipulations or the understanding of the parties with regard to the payment of the proceeds of the sales.'³ But the statute does require honesty; the proceeds must be applied to the extinguishment of the mortgage debt; no mortgage will stand if any undertaking, in or out of it, is disclosed, that the mortgagor may sell as before, for his own benefit.⁴ The rights of creditors are left in substance where they were before.

Apart from any peculiarity in or growing out of this particular statute, the New Hampshire doctrine obtains in substance in very many other states and in the Supreme Court of the United States. In New York the rule was foreshadowed by an expression of Mr. Justice Bronson in the year 1837. In the case⁵ referred to it appeared that there had been a bill of sale and mortgage of a stock of goods to be advanced to the mortgagor, stipulating that until default the mortgagor was to remain in possession. After receiving

¹ 52 N. H. at p. 155. See also *Lang v. Stockwell*, 55 N. H. 561.

² Gen. Sta. of N. H. c. 123, § 13.

³ *Wilson v. Sullivan*, 58 N. H. 260, Foster, J.

⁴ *Ib.* citing *Ranlett v. Blodgett*, 17 N. H. 298, 304, 305; *Coolidge v. Melvin*, 42 N. H. 510, 522; *Putnam v. Osgood*,

51 N. H. 192, 202. The Ohio and New York cases were distinguished in regard to the mortgagee's consent on the ground of the statute; though in those states too the mortgage is good where the mortgagor is to sell only as agent of the mortgagee. See *infra*.

⁵ *Wood v. Lowry*, 17 Wend. 492.

the goods the mortgagor proceeded to sell them in the usual way of retail trade, treating them as his own. In replevin by the mortgagee against another creditor who, two months after the transaction, had attached the goods, it was left to the jury to say whether the mortgage was executed with a fraudulent intent; and the jury found for the defendants, that is, the intent was found. A motion for a new trial on the ground of misdirection was now denied by the Supreme Court. The defendant had prevailed in contesting the mortgage, and hence it was not for him to object, nor was he objecting, that the question of intent had been left to the jury. But the court now declared that the case would have well warranted the judge in instructing the jury that the transaction was fraudulent and void in law, and to find accordingly.

This suggestion appears not to have been acted upon at first. Three years afterwards a case¹ which has been much discussed went to the Court of Errors, where a diversity of views was developed; but it was not in fact treated as raising the question under consideration. There had been a mortgage of printing presses and materials, and household furniture, stipulating that the mortgagor should remain in possession and full and free enjoyment until default. The property was attached by other creditors; the mortgagees replevied; and they now insisted that the question of fraudulent intent should be submitted to the jury. This the court refused, and ordered a *nonsuit*. The Supreme Court affirmed this action of the court; but the Court of Errors decided that the case should have been given to the jury. The question however was treated as one of possession, and not as one of reserved benefits inconsistent with the idea of a mortgage.²

¹ Smith v. Acker, 23 Wend. 653. An intermediate case of Stoddard v. Butler, 7 Paige, 163; s. c. on appeal, 20 Wend. 507, may also be noticed. There had been an assignment, by way of mortgage, of goods in trade, the mortgagor being allowed to retain possession and sell as *agent* of the mortgagees. There were various badges of fraud, and the assignment was upset.

² See Griswold v. Sheldon, 4 Comst. 580, 594, Mullett, J.

Eleven years later a case¹ went to the Court of Appeals of the same state, upon a question of construction of language; the question being whether a particular mortgage of a stock of goods in trade was intended to give the mortgagor the right to continue in possession and to sell the goods as before. Four of the judges found the objectionable provision in the mortgage; four others failed to find it; but the latter agreed with the former that a mortgage of goods in trade, which contained a provision allowing the mortgagor to retain possession and sell and dispose of the same at his pleasure, would be invalid against subsequent purchasers 'and perhaps creditors.'² Shortly afterwards another case³ went to the same court, in which a mortgage had been made of a stock of goods in trade, the mortgagor to continue in possession, but forbidden to sell on credit. A majority of the court held that the mortgage was fraudulent against other creditors, the provision against the mortgagor's selling on credit implying permission in him to sell for cash,⁴ of course for himself.

This decision appears to have set at rest the question of the effect of *plain*⁵ provisions giving a mortgagor the right

¹ *Griswold v. Sheldon*, 4 Comst. 581 (1851).

² Referring to *Wood v. Lowry*, 17 Wend. 492, *supra*, p. 235. Bronson was now Chief Justice, and was one of first four of the text. Quære whether such a provision would now be considered as one that might be interpreted in a sense which would sustain it, to wit, that the mortgagor's powers were not his own to exercise at will, but only such as the courts would allow him to exercise, as in the cases to be stated presently. In Wisconsin authority to the mortgagor to sell and to replace with new goods is interpreted as not unlawful, 'to replace' being treated as of no force. *Roundy v. Converse*, 71 Wis. 524. Sed quære, for the provision looks to the mortgagor's continuing the business

indefinitely. *Means v. Dowd*, 128 U. S. 278, following the New York authorities; *Griswold v. Sheldon*, *supra*; *Nicholson v. Leavitt*, 2 Seld. 510. It is conceded however that a provision giving the mortgagor power to sell for himself would establish fraud. *Ib.*; *Baum v. Bosworth*, 68 Wis. 196; *Anderson v. Patterson*, 64 Wis. 557.

³ *Edgell v. Hart*, 5 Seld. 213.

⁴ There seems to have been a doubt as to what the provision in favor of the mortgagor was.

⁵ Fraud is not to be lightly inferred; the provision should *plainly* give to the mortgagor rights inconsistent with the nature of a mortgage, such as the right to use and enjoy as before. *Baldwin v. Little*, 64 Miss. 126; *Hisey v. Goodwin*, 90 Mo. 366; *Robbins v. Butcher*, 104

to sell or enjoy for his own benefit;¹ and what further difficulties the later New York authorities present relate more to questions of construction than to the rule of law where there is no place for construction.² Thus Mr. Justice Grover has said that if there is an agreement that the mortgagor may sell and dispose of any of the property for himself, it is 'conclusively established that the mortgage was given for some purpose other than that of securing a debt to the mortgagee,' and that purpose is 'evidently the better to enable the mortgagor to enjoy the benefit thereof at the expense of his creditors.' And the learned judge accordingly declared that there was no question of intention for the jury in such a case.³ And more recently the rule has been reaffirmed (by a majority of the court) in a case⁴ in which the agreement was external to the mortgage.⁵

Among the authorities in other states in which the New Hampshire doctrine is upheld may be particularly mentioned those of Ohio; one⁶ of which has been widely quoted. In the case referred to it appeared that A, B, and C had been part-

N. Y. 575; *Townsend v. Sternes*, 32 N. Y. 214; post, p. 265.

¹ *Mittnacht v. Kelly*, 3 Keyes, 407; *Russell v. Winne*, 37 N. Y. 591; *Southard v. Benner*, 72 N. Y. 424; *Delaware v. Ensign*, 21 Barb. 85; *Brackett v. Harvey*, 91 N. Y. 214; *Potts v. Hart*, 99 N. Y. 168. In the last case it is declared: 'That such a state of things rendered the mortgage fraudulent and void as against creditors cannot be disputed.'

² In *Mittnacht v. Kelly*, supra, Parker, J. says: 'The mortgaging the whole stock in trade, with the *increase and decrease* thereof, and the providing for the continued possession of the mortgagor can have no other meaning than that the mortgagee shall all the time retain a lien on the whole stock, by way of mortgage, the mortgagor making pur-

chases from time to time and selling off in the ordinary manner, the intent being not to create an absolute lien on any property, but a fluctuating one, which should open to release that which should be sold and take in what should be newly purchased. This is just such an arrangement as was held in *Edgell v. Hart* [supra] to render the mortgage void . . . The law propounded in that case must be held applicable to this.'

³ *Russell v. Winne*, supra.

⁴ *Southard v. Benner*, supra.

⁵ Comp. however *Adams v. Davidson*, 10 N. Y. 309, a case of assignment of a stock of goods, in which, after 'symbolical' delivery, the assignee allowed the assignor to continue in possession and management as before apparently for himself.

⁶ *Collins v. Myers*, 16 Ohio, 547.

ners in trade, that the partnership had been dissolved, and that C had assumed the debts. To secure A and B against responsibility, C now executed to them a mortgage of the entire stock of goods and such additions as might be made; the mortgage giving to him the right to retain possession for the ordinary purposes of barter and sale, until the retiring partners should be compelled to pay some of the partnership debts or should become fearful that they would be called upon to pay, when they might take possession and sell the mortgaged property. The mortgage was held void on its face, on the ground taken in Virginia,¹ that it was in reality no mortgage at all; it was nothing but a reliance upon the mortgagor's honesty, and in fact was no security because the mortgagor might at any time defeat it by selling out the whole property at once.²

A few years later a case³ much cited arose in the same state in which the mortgagor had been allowed, by oral arrangement, to retain possession and sell the goods as his own, and the New Hampshire case⁴ above stated was followed. The question of the existence of a trust or reservation, where none was disclosed on the face of the instrument in question, was a question of fact, with the presumption of its existence

¹ Ante, p. 232.

² 'True,' continued the court, 'it may furnish a more specific remedy for the collection of the debt, but it is not a specific and certain security at its inception. To hold such a mortgage valid would enable a debtor to do business upon a capital within the limits of the mortgage debt at the will of the mortgagor, protected from all claims of other creditors. . . . In such a case the whole right to dispose of the property to pay a debt depends upon the will of the debtor. . . . If it be the will of the debtor to appropriate the mortgaged property to pay the debt, it is binding as against the mortgagee; but if it be not the will of

the debtor, and the property is seized upon execution, the rights of the mortgagor fasten upon the property and take it away from the execution creditor. Then the property is not held by the mortgage, but by the will of the debtor. . . . He may dispose of the property, defeat the mortgage, and put the money in his own pocket; but if he refuses to pay a debt, and you seize the property in execution against his will, the mortgage steps in and restores it to the debtor.'

³ *Freeman v. Rawson*, 5 Ohio St. 1.

⁴ *Coburn v. Pickering*, 3 N. H. 415, ante, p. 233.

if the vendor or mortgagor was left in possession; but if the trust or reservation was established, the conclusion was a necessary one, that the conveyance was fraudulent. More fully stated, the rule was declared to be this: A chattel mortgage, with a power of disposition reserved to the mortgagor, is fraudulent against other creditors; if the power appears on the face of the mortgage, or is fairly to be inferred from its provisions, the court should so declare it, and not submit the question (of fraud) to the jury; and though the power does not appear there, yet if it is understood or agreed upon at the time of the execution of the mortgage, the result is the same; in either case 'the mortgage is fraudulent in law irrespective of the intention of the parties.'¹

It will not be necessary to state particularly the many other state authorities which have followed the lead of New Hampshire. For the present purpose they contain nothing different from what has now been shown. Suffice it to say that the New Hampshire doctrine prevails more widely than any other.²

¹ In the subsequent case of *Harman v. Abbey*, 7 Ohio St. 218, the same court says: 'The stipulations that Harman [the mortgagee] should at all times hold absolute and exclusive possession against all persons other than Sanderson the mortgagor, and release all claims to the mortgaged property as soon as his debt should be fully paid, could have no effect to take this case out of the rule of' the Ohio cases above stated.

² *Davis v. Ransom*, 18 Ill. 396; *Read v. Wilson*, 22 Ill. 377; *Barnet v. Fergus*, 51 Ill. 253; *Simmons v. Jenkins*, 76 Ill. 479; *Greenebaum v. Wheeler*, 90 Ill. 296; *Dunning v. Mead*, ib. 376; *Anderson v. Patterson*, 64 Wis. 557; *Roundy v. Converse*, 71 Wis. 524, 528; *Baum v. Bosworth*, 68 Wis. 196; *Blakeslee v. Rossman*, 43 Wis. 116; s. c. 44 Wis. 550; *Brooks v. Wimer*, 20 Mo. 503; *Lodge v. Samuels*, 50 Mo.

204; *Weber v. Armstrong*, 70 Mo. 217; *Hatcher v. Winters*, 71 Mo. 30; *Claphard v. Bayard*, 4 Minn. 533; *Horton v. Williams*, 21 Minn. 187; *Stein v. Munch*, 24 Minn. 390 (agreement not in the mortgage); *First National Bank v. Anderson*, ib. 435; *Bannon v. Bowler*, 34 Minn. 416; *Galt v. Dibrell*, 10 Yerg. 146; *Tennessee Bank v. Ebbert*, 9 Heisk. 153; *McCrasley v. Hasslock*, 4 Baxt. 1; *Nailer v. Young*, 7 Lea, 735; *Phelps v. Murray*, 2 Tenn. Ch. 746; *Williams v. Evans*, 6 Neb. 216; *Hedman v. Anderson*, ib. 392; *Harman v. Hoskins*, 56 Miss. 142; *Joseph v. Levi*, 58 Miss. 843; *Baldwin v. Flash*, ib. 593; s. c. 59 Miss. 61; *Britton v. Criswell*, 63 Miss. 394; *Hitchler v. Citizens' Bank*, ib. 403; *Murray v. McNealy*, 86 Ala. 234; *Owens v. Hobbie*, 82 Ala. 466; *Benedict v. Renfro*, 75 Ala. 121; *City Bank v. Goodrich*, 3

To the long catalogue of decisions by the state courts must be added the authority of the Supreme Court of the United

Colo. 139; *Wilson v. Voight*, 9 Colo. 614; *Brasher v. Christophe*, 10 Colo. 284; *Orton v. Orton*, 7 Oreg. 478 (not in the mortgage); *Jacobs v. Ervin*, 9 Oreg. 52 (not in the mortgage). See also *Hewson v. Tootle*, 72 Mo. 632; *De Wolf v. Sprague Manuf. Co.*, 49 Conn. 282; *Sparks v. Mack*, 31 Ark. 666.

To the foregoing must be added the Pennsylvania authorities, for although it follows necessarily in that state that the mortgages under consideration are fraudulent *per se*, from the fact that retaining possession alone makes such a case there (*Milne v. Henry*, 40 Penn. St. 352), still the authorities appear to be wider and not to turn upon possession; they make all objectionable trusts and reservations in favor of the grantor void as matter of law. *Bentz v. Rockey*, 69 Penn. St. 71 (transfer by a tanner, insolvent, of all his property to a certain creditor, in payment of his debt, with an understanding that the debtor should have back part of the property for working out his stock, declared void as to other creditors); *Kepner v. Burkhardt*, 5 Barr, 478 (transfer of property by debtor to creditor, with undertaking by the latter to pay the debts of the former within six years); *Peters v. Light*, 76 Penn. St. 289 (assignment for creditors generally, the assignees to carry on the business during the pleasure of the creditors). See also *Connelly v. Walker*, 45 Penn. St. 449.

In *Pierce*, *Mortgages of Merchandise*, § 68, the decisions of the various federal courts to the same effect are reviewed or noticed; and in §§ 79 et seq. the state authorities which favor the New Hampshire doctrine are considered, embracing cases in Connecticut, North

Carolina, Arkansas, and Nebraska. To this list Texas is to be added, by direct statute. Gen. Laws 1879, c. 53, § 17; *Pierce*, § 106. For the Alabama law, which in some cases is the same, see *Commercial Bank v. Brewer*, 71 Ala. 574.

The following are the federal decisions referred to by Mr. *Pierce*: *Smith v. McLean*, 10 Nat. Bank Reg. 260; *In re Forbea*, 5 Biss. 510; *In re Bloom*, 17 N. B. R. 425; *McLean v. Lafayette Bank*, 3 McLean, 587, 623; *Bowen v. Clark*, 1 Biss. 128; *In re Kahley*, 2 Biss. 383; *In re Cantrell*, 6 Ben. 482; *In re Morrill*, 2 Sawy. 356; *In re Burrows*, 7 Biss. 526; *Smith v. Ely*, 10 N. B. R. 553; *Catlin v. Currier*, 1 Sawy. 7; *In re Kirkbride*, 5 Dill. 116; *Crooks v. Stuart*, 2 McCr. 13; *In re Manly*, 2 Bond, 261; *In re Perrin*, 7 N. B. R. 283; *Smith v. Kenney*, 1 Mackey, 12; *Fox v. Davidson*, *ib.* 102.

Among the decisions cited from the state courts as favoring the New Hampshire rule the following may be mentioned: *Bishop v. Warner*, 19 Conn. 460; *Lewis v. McCabe*, 49 Conn. 141; *Foster v. Woodfin*, 11 Ired. 339; *Hardy v. Skinner*, 9 Ired. 191; *Hardy v. Simpson*, 13 Ired. 132; *Cheatham v. Hawkins*, 76 N. Car. 335; s. c. 80 N. Car. 161; *Holmes v. Marshall*, 78 N. Car. 262; *Boone v. Hardie*, 83 N. Car. 470; *Sparks v. Mack*, 31 Ark. 666. The North Carolina cases differ from the New Hampshire only in requiring the facts on the face of the deed to be very strong. Indeed that is true also of the Massachusetts doctrine, as will appear later; but the North Carolina cases go farther than those of Massachusetts. See *Cheatham v. Hawkins*, 80 N. Car. at p. 164. In this case the

States.¹ The subject was most carefully considered in the case first cited; though the question turned of necessity upon local law. The decision therefore could have no binding effect except as touching the local law;² and it is significant of our system of federative government that an inferior federal court may refuse, and one has refused, to accept the law as laid down for another jurisdiction by the court of last resort.³

The case in the federal Supreme Court should be stated, for it brings into the question facts not noticed in the cases thus far stated. The case turned upon the law of Indiana. The statutes of that state, like those of other states, permit the mortgagor of goods to retain possession if the deed is recorded.⁴ The mortgage in question, which was upon a stock

court says: 'To leave a stock of goods, after they have been conveyed by mortgage, in the debtor's possession and subject to his exclusive control and disposition as if they were his own, while they are at the same time placed beyond the reach of execution, is itself a fraud; because it does secure ease and exemption to the debtor and obstructs the creditor's remedial process, for the enforcement of his debt, against the property.' See also *Moore v. Hianant*, 89 N. Car. 455. Some other courts follow the New Hampshire doctrine in part. See *Johnson v. Thweatt*, 18 Ala. 741; *Gregory v. Wilson*, 8 Neb. 373; *Williams v. Evans*, 6 Neb. 216; post, p. 264, note.

¹ *Robinson v. Elliott*, 22 Wall. 513; *Bank v. Hunt*, 11 Wall. 391; *Means v. Dowd*, 128 U. S. 273.

² Indeed it seems that the courts of the state (Indiana) whose law was under consideration did not fully accept the decision of the Supreme Court of the United States; and statute has now settled the matter according to the Massachusetts doctrine. *Robinson v. Elliott*

was at first expressly followed. *Mobley v. Letts*, 61 Ind. 11; *Davenport v. Foulke*, 68 Ind. 382. But see *Louthain v. Miller*, 85 Ind. 161; *McFadden v. Hopkins*, 81 Ind. 459. *Mobley v. Letts* was overruled in *McFadden v. Fritz*, 90 Ind. 590, under recent statute providing that a mortgage shall not be void on its face for failing to require the mortgagor, when given possession, to account for the sales. Further see *Morris v. Stern*, 80 Ind. 227; *Lockwood v. Harding*, 79 Ind. 129; *McLaughlin v. Ward*, 77 Ind. 383; *Fisher v. Syphers*, 109 Ind. 514.

³ *Brett v. Carter*, 2 Lowell, 458.

⁴ The material part of the statute of Indiana reads thus: 'No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged . . . and recorded . . . within ten days after the execution thereof.' Rev. of 1876, c. 122, § 10.

of goods in trade, contained a provision that until default the mortgagors should remain in possession and sell the goods as before, supplying the place of those sold with other goods, upon which the mortgage lien was at once to attach. The court held that the only effect of the statute was to substitute recording for change of possession; it did not have the effect to make *prima facie* valid a transaction which before the statute would have been fraudulent;¹ and the mortgage was pronounced fraudulent upon its face. The court drew the distinction clearly between the effect of merely retaining possession and retaining possession with a power of disposal for the benefit of the mortgagor. The latter, it was declared, was inconsistent with the nature of a mortgage; it was no protection to the mortgagee; it presented a shield for a dishonest debtor.²

This brings us to the Massachusetts doctrine. In a leading case³ a trader, it appeared, had mortgaged his stock in trade by an instrument which provided that until condition broken the mortgagor might retain in his possession and use all the mortgaged property without hindrance or interruption from the mortgagee. An oral agreement was also entered into by the parties at the same time that the mortgagor might sell and dispose of the mortgaged property and apply the proceeds to his own use, upon the undertaking that if he should make large sales he would make good the place of what was sold by other property. It was held, not that this established of itself the intent of the statute of Elizabeth, but that it con-

¹ See also *Singer v. Sheldon*, 56 Iowa, 354.

² Quere under this rule, in regard to the effect of a provision for temporary possession and use, subject to the exercise at any moment of the right of the assignee or trustee to take the property, or to foreclose the mortgage. That would not avoid the transaction according to Alabama law. *Globe Ins. Co. v.*

Thacher, 37 Ala. 458. But Alabama law differs in some particulars, as has been said already, from the law laid down by the Supreme Court of the United States. The only danger from the right of temporary enjoyment is that it may be a cover for fraud; it should be regarded with suspicion at all events.

³ *Briggs v. Parkman*, 2 Met. 258.

stituted only a badge or presumptive evidence of fraud, and so was explainable.

Shortly afterwards, in trover¹ for a stock of goods claimed under a mortgage, against a deputy sheriff who had attached them on a writ by a creditor of the mortgagor, it appeared that the mortgage provided that the mortgagor might sell and dispose of the property provided he purchased and kept in the store other goods of like value and applied the sales thereof to the payment of the mortgage debt. It was decided that this did not show a case of fraud per se. The court declared the rule of law to be that, wherever the terms and stipulations of a contract were by possibility compatible with good faith,² and had on their face the elements of a legal contract, the question of fraudulent intent was a matter to be submitted to the jury; and this was such a case.³

The Massachusetts doctrine has had a considerable following. In Maine it is fully accepted. In a case⁴ of the year 1859 there had been a mortgage of a stock of goods, with a provision that the mortgagor should remain in possession

¹ Jones v. Huggeford, 3 Met. 515.

² See Cheatham v. Hawkins, 76 N. C. 335.

³ The validity of provisions in favor of the mortgagor's continuing his business as before in these cases is again tacitly assumed in Barnard v. Eaton, 2 Cush. 294, 303, 304. Shaw, C. J.: 'Another objection to the plaintiff's title is, that by the terms of the mortgage the mortgagor retained possession with a power to sell, and that he did in fact sell, by putting in the mortgaged property, soon after the mortgage, as his share towards the stock of a partnership entered into by him with T. This at most can be regarded as the sale of an undivided part; but we think it was not a sale in the ordinary course of business, where a retail trader mortgages his stock with an intent to carry on and not

suspend his business, as in the case of Briggs v. Parkman, 2 Met. 258, and that the sale was not within the power.' More recently, in a like case, the court by Morton, J. said: 'The third exception of the defendants was to the refusal of the court to rule that the plaintiffs' mortgage was void because it contained a power to the mortgagor to sell the goods in the regular course of trade. This is not now an open question in this commonwealth, it having been repeatedly held that such a power given to the mortgagor does not per se avoid the mortgage, but is at most only evidence of a fraudulent purpose, to be submitted to the jury.' Fletcher v. Powers, 131 Mass. 333. See also Brett v. Carter, 2 Low. 459; Oriental Bank v. Haskins, 3 Met. 332.

⁴ Googins v. Gilmore, 47 Maine, 9.

without denial or interruption by the mortgagee for the period of one year, and an understanding that the mortgagor might go on as before in selling the goods. The court held that this was a case to be submitted to the jury, on the intent, in accordance with the uniform current of the authorities in Maine.

In Iowa, where the Massachusetts doctrine also prevails, the direction of the authorities was set by a case¹ in which the court took a remarkable view of the statute allowing a mortgage of chattels with possession in the mortgagor to stand against other creditors if the mortgage was recorded. Under such a statute the court thought it 'most difficult to conceive how the retention of possession by the mortgagor could ever, under any circumstances, be regarded a fraud in law.' Whether this ground would still be considered tenable or not is not clear; though it has been enforced to the extent of affirming that the statute, having given to the mortgagor a right of possession, must have intended to give to him also a reasonable use of the property, where that is not necessarily consumed in the use.²

In a Michigan case³ a mortgaged stock of goods was left in the hands of the mortgagor, with power to sell in the usual course of business for cash or on credit; and it appeared that the mortgagor had continued to sell, applying the proceeds in the purchase of other goods, in the support of himself, and in paying debts other than that secured by the mortgage, all without objection from the mortgagee. The court held that this did not show, as matter of law, that the mortgage was fraudulent; the question of fraud was for the jury, by statute.⁴

¹ *Torbert v. Hayden*, 11 Iowa, 435. 65 Iowa, 606; *Meyer v. Evans*, 66

² *Hughes v. Cory*, 20 Iowa, 399. Iowa, 179.

There was no agreement for accounting in this case. See further *Clark v. Hyman*, 55 Iowa, 14; *Sperry v. Etheridge*, 63 Iowa, 543; *Jaffray v. Greenbaum*, 64 Iowa, 492; *Meyer v. Gage*,

³ *Oliver v. Eaton*, 7 Mich. 108.

⁴ See the effectual answer to this by Denio, J. in *Edgell v. Hart*, 9 N. Y. 218; *infra*, p. 258, note. The statute of Michigan is the same as that of New York.

The case could be taken from the jury only when the provisions in favor of the debtor were illegal and not to be reconciled 'on any possible hypothesis with an honest or legal intent.'¹

In a similar contemporaneous case² in the same state the court, adhering to the rule, distinguished the case from an assignment for the benefit of creditors. The rules applying to assignments, it was said, required an unreserved surrender of property, with no resulting benefits, until the debts were all paid; an assignment could not otherwise be reconciled with fairness. As for other cases, the law did not impose any specific duty concerning the provisions to be made. Afterwards however a different ground, intended perhaps as additional, was taken; it was now declared that by the law of Michigan mortgaged chattels did not cease to belong to the mortgagor until steps had been taken to put an end to his rights. The mortgage was a mere security to the mortgagee, not a transfer of title; that is to say, the common law doctrine, that a mortgage is a conditional sale, passing a title subject to a defeasance, did not prevail in Michigan.³ Hence it could not be fraudulent for the mortgagor to exercise the ownership which by the law itself was still his.

A more recent case⁴ shows that it was not meant to suggest that the mortgage would be good, where nothing really accrued to the mortgagee except a right on default to make the lien available for the debt. In the case referred to the mortgage contained a provision that the mortgagor 'shall be allowed to continue the sale of goods from said store as though this instrument was not made.' But the mortgagees were to have the right to take possession at their pleasure;

¹ Of course there may be external evidence of fraud in such cases. *King v. Hubbel*, 42 Mich. 597.

² *Gay v. Bidwell*, 7 Mich. 519.

³ The same is true in other states, in virtue of statutes like that relating to

mortgages of land in New York; as to which latter see *Kortright v. Cady*, 21 N. Y. 343; *Caruthers v. Humphrey*, 12 Mich. 270.

⁴ *Wingler v. Sibley*, 35 Mich. 231.

and to the suggestion that the mortgagees had nothing by the mortgage the court answered by referring to this right.¹ The Massachusetts doctrine requires that the provision in question shall not be wholly inconsistent with the nature of a mortgage.²

It will not be necessary to present any more of the cases in the state courts which have followed or favored the lead of Massachusetts; nothing new will be found in the rest.³ Two cases in the federal courts should however be noticed. One of them, decided by Mr. Justice Story in 1843, in equity, has been much cited.⁴ A mortgage had been made, to run for four years, upon a factory, its tools and implements, and the stock in trade, with a provision that the mortgagors should hold and enjoy the premises and take the rents and profits for their own use and benefit. Bankruptcy followed after two years and a half, and the assignee claimed the property against the mortgagee, who had finally taken possession; but the court upheld the mortgage. It was considered that the power of sale in favor of the mortgagor was not inconsistent with the nature of a mortgage, because new goods might take the place of those sold, and to these the mortgage would in equity attach.⁵ Further the registration of

¹ Campbell, J.: 'It would be absurd to suppose it was intended no rights should accrue to the mortgagees, who were expressly allowed to take possession at their pleasure.' For other Michigan cases see *Leland v. Collver*, 34 Mich. 418; *American Cigar Co. v. Foster*, 36 Mich. 368; *Cadwell v. Pray*, 41 Mich. 307.

² See *Robbins v. Parker*, 3 Met. 117, 120: 'The conduct of the parties is inconsistent with the object of a mortgage, which is to secure the creditor.'

³ *Lister v. Simpson*, 38 N. J. Eq. 438; *Turner v. Killian*, 12 Neb. 580 (by statute); *Frankhouser v. Ellett*, 22 Kans. 127; *Cameron v. Marvin*, 26

Kans. 612; *Ross v. Wilson*, 7 Bush, 29. Some of the authorities take an intermediate view. See especially *Tickner v. Wiswall*, 9 Ala. 305; *Johnson v. Thweatt*, 18 Ala. 741; *Constantine v. Twelves*, 29 Ala. 607; *Reynolds v. Welch*, 47 Ala. 200; *Commercial Bank v. Brewer*, 71 Ala. 574; *Pierce, Mortgages of Merchandise*, §§ 101-106. In Georgia such mortgages are made good by statute. Code of 1878, § 1954; *Goodrich v. Williams*, 50 Ga. 425; *Pierce*, § 111.

⁴ *Mitchell v. Winslow*, 2 Story, 680 (Circuit Court for Maine).

⁵ This point was considered at length.

the mortgage was notice to the other creditors of the entire transaction.¹

The other² of the two cases was decided in the year 1875, and has already been referred to as rejecting the rule laid down by the Supreme Court of the United States for another jurisdiction. In this case a mortgage of a stock of stationery in trade to be supplied, and supplied accordingly, by the mortgagee, had been executed; and by arrangement the mortgagor was allowed to continue the business for himself as before, in the usual course. It was held in a bill in equity by an assignee in bankruptcy, that the mortgage was valid against other creditors. The view taken by the court was that the mortgage could be pronounced void only upon the footing of 'constructive or artificial fraud,' of which frauds there were now but two by the law of England; these two were, first, those made such by statute, and secondly, those in which the act was necessarily a fraud upon creditors. A conveyance for present value, it was the understanding of the court, 'is never a fraud in law on the face of the deed.'

It was further considered that the registration law had done away with the old mischiefs resulting from retaining possession and disposal; and it was still further deemed to be plain that the rule contended for by the plaintiff would virtually prevent a trader from mortgaging his stock at any time for any useful purpose; 'for if he cannot sell in the ordinary course of trade, or only as the trustee and agent of the mortgagee, he might as well give possession to the mortgagee at once and go out of business.' The fact was also dwelt upon that the whole original stock was supplied by the mortgagee, and that there was no suggestion of any actual intent to defraud.

¹ 'I am not aware,' said the learned judge, 'of any policy of the law, or of any principle of law, which makes any conveyance of this sort invalid as to creditors, if they have full notice, or

may have full notice of it by the exercise of reasonable diligence.'

² Brett v. Carter, 2 Low. 458 (Dist. Court of Mass.).

No successful attempt has been made to show that the Massachusetts doctrine conforms to general law. What appears to have been taken as the chief ground of support for it is the rule which prevails in most of the states, and in England, that retaining possession after sale is not accounted as establishing, in itself, a fraudulent intent. The answer to that is, that possession with a power of disposal is much more than possession; and if possession alone may make a presumptive case, possession with power of disposal for the debtor may well make an absolute case.¹ But it is said by the Iowa court that statute has given to the mortgagor of chattels an actual *right* to retain possession, and that that implies a right of 'reasonable use' of the property.² But the question remains, what is meant by 'reasonable use.' Does 'reasonable use' imply the right on the part of the debtor to take from other creditors what is subject to their claims, and what they have not agreed that he should take? More specifically does 'reasonable use' imply that the debtor may sell the property for himself, and so practically revoke the mortgage in part or in whole?³ Reasonable use cannot mean unlawful use. It should seem that the term was entirely satisfied by the debtor's having the place, with the salary, wages, or emoluments growing out of it.⁴ His possession is not an empty one where he is acting for the mortgagee; no mortgage would ever be made with an agreement for accounting to the mortgagee if possession were only a burden.

It is declared by the Michigan court that statute has wholly changed the nature of chattel mortgages; that they are no

¹ In *Briggs v. Parkman*, 2 Met. 258, the case is disposed of by saying that the power of sale may make a stronger presumption than the provision for possession; 'but that is a difference only in the weight of evidence.' See also *Cheatham v. Hawkins*, 76 N. Car. 335; s. c. 80 N. Car. 161, to the same effect.

² Ante, p. 245.

³ A right to 'retain the use' of goods 'cannot be tortured into a power of sale.' *Williams v. Evans*, 6 Neb. 216, 219.

⁴ *Weber v. Armstrong*, 70 Mo. 217, overruling *Lodge v. Samuel*, 50 Mo. 204.

longer conditional sales; that the ownership now remains in the mortgagor.¹ And from this the conclusion is drawn that it cannot be fraudulent as matter of law for the mortgagor to deal with his own. This is the most serious argument that has been made in support of the Massachusetts doctrine, or rather of the Massachusetts doctrine as modified by statutes changing the nature of mortgages. The argument applies chiefly however to cases of the sale of goods in traffic, to be replaced with others which are to fall within the mortgage. But it is pertinent to observe, with the Ohio court,² that the goods to take the place of those sold may not be forthcoming; 'and if we look to experience in all cases where a trader has felt bound to mortgage his whole stock, it is not the usual result' that they will be. There is then no certainty, when the mortgage is made, — the time when the 'intent' of the law is looked for, — that the lien will have anything to operate upon. A mortgage lien should be a certainty.

It may be thought however that the fact that new goods are supplied 'purges' any fraudulent intent; what was uncertain having now been made certain. This however is as far as the argument concerning the modified nature of a mortgage can go. Even under the laws of Michigan the mortgage creates a lien; and that lien should be preserved. A sale of things not to be replenished would destroy the lien; and a mortgage, or an arrangement out of the mortgage, which would permit that would show that the instrument was not to answer its purpose. Some other purpose must have been in view; the reasonable interpretation of which is, that the transaction was intended to hinder other creditors. Whether that was the actual intention or not should be immaterial, since it is the reasonable interpretation to put upon such a transaction.

To pass on from the state authorities to the two federal

¹ Ante, p. 246.

² Collins v. Myers, 16 Ohio, 547.

cases above mentioned, it is said in the first¹ of them that a power of sale in the mortgagor for his own benefit is not inconsistent with the nature of a mortgage because other goods *may* be put in the place of those sold. Now it may be remarked that this would be equally true of a power of sale in a mortgage of any kind of goods; and it seems to be a legitimate conclusion, that if such a mortgage is valid in regard to goods in trade it is valid in regard to goods generally. But passing over this suggestion, it is to be observed that there is a certain confusion in saying that the power of sale is consistent with the mortgage. So it may be between the parties; but is it consistent with the nature of a mortgage, towards other creditors? Can the non-favored creditors be expected to stand aside and see the estate eaten into by the mortgagor with the help of the mortgagee, and then see the mortgagee take the rest?

The suggestion that new goods may be put in the place of those sold appears to rest upon an idea that such replenishing of the stock, when it takes place, has the effect of annulling or purging any wrong in the original transaction, or at least of making a sort of stand-off as if no sale had been made. To this several answers may be given:—

1. Assuming that the fraud may be purged,² this act of replenishing is not a purging, for it is only part of a scheme which keeps the debtor in the enjoyment of goods which ought to go, and do not go, to the payment of his debts. The mortgagee should, in justice to other creditors, be paid by the sales; that is, the benefits which have gone to the debtor

¹ *Mitchell v. Winslow*, 2 Story, 630.

² Coke says of fraud in the beginning, that nothing will afterwards 'anyways salve and amend the matter.' *Stone v. Grubham*, 2 Bulstr. 225. And so it is held of this particular kind of case, in *Blakelee v. Rossman*, 43 Wis. 116; s. c. 44 Wis. 550, in *Dela-*

ware v. Ensign, 21 Barb. 85, and in *Janvrin v. Fogg*, 49 N. H. 340. See also *Weller v. Wayland*, 17 Johns. 102. But see *Oriental Bank v. Haskins*, 3 Met. 322; *Read v. Wilson*, 22 Ill. 377; *Brown v. Webb*, 20 Ohio, 389. See chapter 16.

alone should have gone to the payment of the mortgage so that they might not be lost to the other creditors. And that loss, it is to be remembered, is due to the meditated scheme of the debtor and the mortgagee.

2. Again assuming that a mortgage may be executed so as to cover, between the parties, after-acquired property, serious difficulty arises when it comes to claims of other creditors. The case involves the right of the mortgagor to continue the business at pleasure, so long as he pays the interest on the mortgage debt. He may continue the business indefinitely, keeping the other creditors at arm's length, under protection of the mortgage. These creditors are no better off than if there were to be no replenishing; if the mortgage is valid, they cannot touch the new goods. 'The whole right to dispose of the property to pay a debt depends upon the will of the debtor;' should he choose to appropriate the property to the payment of a debt, the mortgagee will be bound; if he choose not to do so, his rights under the mortgage, fastening upon the new goods as well as upon the original, enable him to turn away any attaching creditor.¹

The suggestion in the case under consideration that the mortgage was notice of the transaction has not much force, for the question is whether the transaction of which notice is given is lawful. If it was unlawful, notice of the fact is of no avail; and it is apprehended that the position taken by the Supreme Court of the United States and by other courts, that due registration does not make lawful what before, apart from want of delivery, was unlawful is incontestable. The registration law in regard to chattel mortgages does what delivery of a deed conveying land under modern statutes does; it obviates the necessity of a delivery of the property. So far as want of delivery of chattels sold or mortgaged was capable of being treated as fraudulent, the law was changed; but there is nothing to indicate that more was intended.

¹ *Collins v. Myers*, 16 Ohio, 547, ante, pp. 238, 239.

These questions of the mortgage of goods in trade, which have chiefly called attention to the matter, had not yet become common; they had no part, it is safe to believe, in the legislation touching registration. That legislation was not in the interest of traffic, but arose out of those common transactions in which the very property which is the subject of the mortgage continues under it, — the mortgage of horses, cattle, household furniture and the like. If such a thing as mortgages of chattels in traffic had been contemplated, it is not reasonable to suppose that lawyers with whom a chattel mortgage was a conditional sale would not have made the extraordinary case plain on the face of the statute. The very suggestion of mortgaging goods in trade has always been enough to raise a controversy; and that the lawyers who framed the registration law intended to settle such a controversy without mentioning it is beyond belief.

In the second¹ of the federal cases it is said that the case under consideration is one of 'constructive or artificial fraud,' where the personal intention was pure. This is an error which courts are apt to fall into in accepting the Massachusetts doctrine.² The 'intent' of the statute is taken literally,

¹ Brett v. Carter, 2 Low. 458, ante, p. 248.

² It is not however a necessary result of the Massachusetts doctrine, as will be seen; and yet the Massachusetts court itself has almost fallen into it. In Jones v. Huggeford, 3 Met. 515, the court says: 'On looking at the present conveyance [mortgage of a stock of goods, with power of sale thereafter by and for the mortgagor], although it is found to be somewhat unusual in its provisions, and to contain stipulations that might be very convenient to enable the vendor to exercise all the rights of ownership in the articles conveyed under color of apparent legal title in another . . . ; yet it might also well be

that parties might enter into such a contract with no other than the honest purpose of securing a creditor. Suppose the stock of goods . . . mortgaged much to exceed in value the amount of the debt for which security was required; the party taking such security might be willing to consent to the disposition of a part of the goods mortgaged, being satisfied that the goods remaining would probably furnish an adequate security for the debt.'

It is enough to say that this is not adjudication. The Massachusetts doctrine, of itself, differs only in degree from that of New Hampshire. See post, pp. 258, 259.

that is, in the popular sense, while as we have seen it is clear from other classes of cases, in no wise peculiar, that it has acquired, and probably always was taken to have, a technical meaning. The question is not of any personal intent, but whether the debtor has done certain things obnoxious to law; if he has done them, the intent of the statute is established, whatever the actual motive. The intent follows from the necessary effect of the act.¹ If the act of the debtor amounts to what in the average man would be an endeavor to alter or impair the rights of creditors by any wrongful proceeding, there is fraud; and that fraud is actual; it is the fraud of the statute, not 'constructive or artificial fraud.'

Indeed so persuasive has been the literal meaning of the term in question, that courts which have rightly decided the question under consideration have sometimes thought it necessary to give warning that they do not decide the case upon the ground of fraud but upon the ground that what purports to be a mortgage is no mortgage;² whereas that fact establishes the intent, as a technical term of the law, in the strongest way possible. The average man who had done such a thing would have intended to defeat the complaining creditors. This view has obtained in England over certain cases ever since the bankruptcy law of the time of James the First was passed, declaring void conveyances by insolvent persons whereby the property is left in the 'order and disposition' of the debtor.³

¹ *Harman v. Hoskins*, 56 Miss. 142; *Cheatham v. Hawkins*, 80 N. Car. 161; *Babcock v. Eckler*, 24 N. Y. 623; *Freeman v. Pope*, L. R. 5 Ch. 538; ante, p. 83. Further see chapter 15.

² *Collins v. Myers*, 16 Ohio, 547, ante, p. 239, note; *Peters v. Light*, 76 Penn. St. 289.

³ 19 Jac. 1, c. 19, § 11. The English cases however do not dwell at all upon, or speak very clearly to, the ques-

tion of mortgages of goods in trade, except in cases of bankruptcy, and there the statute of course governs. Apart from bankruptcy laws the cases, though not expressly in point, favor or take for granted the validity of these mortgages. See *Holroyd v. Marshall*, 10 H. L. Cas. 191 (in this case there was an accounting to the mortgagee); *Ex parte Games*, 12 Ch. D. 314, C. A. (here the mortgagee took possession before the other

Another suggestion taken in the same (federal) case appears to be drawn from public policy; the requirements of trade, in this view, make it necessary to uphold mortgages of this kind. But the demands of public policy must be very clear before they should be allowed to prevail over general doctrines of the law; and it can hardly be said that this matter of mortgages of goods in trade makes such a case, when most of the courts of the country, followed by legislation in some of the states, have pronounced against the Massachusetts doctrine. Until there shall have been a sufficient demand for a change of the law in such states, it must be safe to infer that the doctrine which most comports with established law, i. e. the rule of juristic reason, works well, and that it is not necessary to make the exception.¹

creditors intervened); *Ex parte Symmons*, 14 Ch. D. 693 C. A. (possession taken as in the last case); *Ex parte Bayly*, 15 Ch. D. 223, C. A. (same); *Ex parte Alland*, 16 Ch. D. 505, C. A.; *Ex parte Popplewell*, 21 Ch. D. 73, C. A. (under Bills of Sale Act); *Ex parte Bolland*, ib. 543, C. A. (same); *National Bank v. Hampson*, 5 Q. B. D. 177 (purchase for value); *Walker v. Clay*, 42 L. T. N. S. 369; s. c. 49 L. J. C. P. 660 (purchase for value); *Taylor v. McKeand*, 5 C. P. D. 358 (same); *Payne v. Fern*, 6 Q. B. D. 620 (same). Among the earlier English cases see *Edwards v. Harben*, 2 T. R. 596, a leading authority, commonly considered as being a case of possession, but properly it was one of right of property reserved. The strict rule of fraud was laid down. Generally speaking, trusts or reservations in favor of the debtor avoid the transaction in England, as fraudulent in law. *Ex parte Games*, supra, *Thesiger*, L. J.; *French v. French*, 5 De G. M. & G. 95; *Neale v. Day*, 28 L. J. Ch. 45; *Spencer v. Slater*, 4 Q. B. D. 13. See also *Alton v. Harrison*, L. R.

4 Ch. 622; *Ex parte Chaplin*, 26 Ch. D. 319, C. A., general assignment with secret reservation. See also *Edwards v. Harben*, 2 T. R. 596.

Clearly if the transaction is a cloak to enable the mortgagor to retain benefits, the mortgage even in England would be invalid. *Ex parte Games*, supra, *Thesiger*, L. J. So that the difference, so far as there is any, between the representative American rule and the English is a matter of construction only; the English rule construing a provision that the mortgagor may retain possession and continue the business as not making a case of intent in the mortgagor to appropriate the benefit of profits to himself to the defeat or delay of his creditors. See the language of James, L. J. in *Ex parte Games*. But such a construction seems forced.

¹ One is not driven into a difficult place by accepting the suggestion in *Brett v. Carter*, supra, that a person who finds it really necessary to mortgage his entire property in trade had better go out of business, or, as in that case, not go into it. If mortgaged

It may be said that what is given to or reserved by the mortgagor (virtually the profits of the business) would still be subject to the claims of the other creditors. An answer to that might be that such a view of the case would be to treat the mortgage as valid for one purpose and invalid for another, and that if valid at all it should be valid entirely, for the benefits conferred upon the mortgagor as well as for the mortgagee. The mortgage is intended, in part, to give those benefits to the debtor; but that makes the fraudulent intent of the statute, whether the other creditors can reach them or not. Aside from that answer, how are the non-assenting creditors to find the benefits received by the debtor if he should choose to keep them out of their way? The mortgage is a perfect shield. The other creditors cannot get the benefits before they are received, for that would put an end to the mortgage; and as soon as they are received they are kept on the person, or are consumed, or are spirited away. The creditors are necessarily delayed; they cannot take the goods themselves because of the mortgage; they cannot take the profits until they can show that there are profits; they cannot take the proceeds of the sales, for those are to go to the purchase of new stock for the mortgage lien to fasten upon.

If the use of the goods for the debtor had not been reserved or given, other creditors could have proceeded at once against the property, subject to the mortgage, and had it sold out; or they could have secured it to proper purposes, after making a levy upon it subject to the mortgage, by a bill to foreclose their lien and redeem from the mortgage.¹ That could

property is not to be devoted to the purposes of the mortgage, the mortgage should not be made; and if that implies that some one must not go into, or must go out of, trade, the cause of honesty will not be made to suffer, and the particular individual will only be compelled to turn his attention to what he can properly do.

¹ See *Hefner v. New York Life Ins. Co.*, 123 U. S. 463, where Gray, J. says of subsequent lien-holders: 'To a bill in equity to foreclose a second mortgage, although the first mortgagee is not a usual or necessary party when the decree sought and rendered is subject to his mortgage, yet, at least when he holds the legal title, and his debt is

not be done if the mortgage, with the stipulations or arrangements in favor of the debtor, should be allowed to stand.

More than that, when the contest between the mortgagee and the other creditors arises, it appears that what should have been used for the payment of the debt preferred has not been used for the purpose. The favored creditor has not been paid, and still calls for payment out of the property mortgaged, notwithstanding fault of his own which has prejudiced other creditors. That is to say, he has allowed the debtor to have to his own benefit part¹ of the property within the lien, when that might conceivably have been enough to pay the debt, and yet requires the other creditors to stay their hand until he can make good his claim out of what is left. All this was in contemplation when the mortgage was executed, for it is the natural effect of the terms of the mortgage. The intent of the statute, which means nothing more than endeavor, according to the conduct of the average man, to alter or impair the rights of other creditors, has been established.²

The New Hampshire doctrine, it should be remarked, is not affected by a provision of statute that 'the question of fraudulent intent in all cases' of the statute 'shall be deemed a question of fact and not of law.'³ That provision is well held

due and payable, he may, and when the property is ordered to be sold free of all incumbrances, must be, made a party; and if he is, and the bill contains sufficient allegations, he is barred by the decree, the bill in such case being in effect both a bill to foreclose the second mortgage and a bill to redeem from the first mortgage.'

¹ It is not necessary that the debtor should be able to sell the whole property for his own use, to make a case of fraudulent intent; if he can sell or dispose of any of it for his own benefit, that is enough. *Russell v. Winne*, 37 N. Y. 591. In Missouri however the

courts, though following generally the New Hampshire doctrine, apply it only to such goods as fall under the power of sale, and not necessarily to the whole mortgage. *Donnell v. Byern*, 69 Mo. 468; *State v. D'Oench*, 31 Mo. 453.

² 'Such a transaction is necessarily fraudulent. It hinders and delays other creditors, without securing the application of the property or its avails to the payment of the mortgage debt.' *Allen, J. in Southard v. Benner*, 72 N. Y. 424.

³ *Ante*, p. 35. In some states, as in New York and in Michigan, this provision applies only to the general statutes

to apply to cases, and to those only, in which the law itself has not fixed the inference to be drawn from the facts proved. Where the objectionable trust or reservation appears plainly upon the face of a written instrument, or where the same is otherwise established, it would be strange that the verdict of a jury should be taken when, if it contradicted the meaning of the facts, the court would feel bound to set it aside.¹ And this is true, though the language of the instrument is such as to require construction as well as where it speaks in direct terms, if on the construction the trust or reservation is found.²

But the Massachusetts doctrine itself is not inconsistent with what we understand to be the sound view of fraud, for it is not in reality a doctrine of fraud at all; it is a matter, in accordance with what has been stated in a previous chapter,³ of rights. It is harmful indeed, as we conceive, to submit to a jury the question of intent when a trust or

against fraudulent conveyances, not to mortgages and the like. Contra in some other states, as in Minnesota. In many states there is no such statutory provision at all.

¹ In *Ehresman v. Roberts*, 68 Penn. St. 308, it is said that fraud in fact is for the jury however plain the case. That is very well if the jury are rightly instructed as to what constitutes fraud.

² *Mittnacht v. Kelly*, 3 Keyes, 407. In *Edgell v. Hart*, 9 N. Y. 213, Denio, J. says (of a mortgage of a stock of goods, by which the mortgagor was to continue in possession, but forbidden to sell on credit): 'The inhibition to sell on credit . . . by a necessary implication authorized B to sell the goods for cash, and all the circumstances connected with the transaction, as well as the admission in the pleadings, show that the intention of the instrument was that B should continue to retail the mortgaged property and to re-

ceive the proceeds to his own use.' As to the other point: 'The appellants' counsel strenuously contends that inasmuch as the statute has declared that the question of fraudulent intent shall be deemed a question of fact . . . the effect of the mortgage should have been left to the jury. The doubt, if there be one, is whether the law tolerates such an assignment where the rights of creditors are concerned. There was no traversable question either respecting the intention of the parties. The law adjudges that they intended what the writing expresses; and it would be incompetent for either party to show, if possessed of the most persuasive evidence, that they designed the instrument to have a different operation from the one the law assigns to it. . . . If by law it was void as against creditors, the court would be obliged to set aside a verdict affecting its validity.' See ante, p. 245.

³ Ante, pp. 226-228; post, chap. 16.

a reservation of an objectionable nature on its face is proved; the trust or reservation should establish the intent. But that is only a question of the extent of creditors' rights in Massachusetts; when those rights are actually transgressed, the result is the same as in New Hampshire or New York,—the intent of the statute is made out. The Massachusetts doctrine does not require the courts to hold that the intent of the statute is a personal intent of the debtor. To such a position no court should allow itself to be driven by any rule of law yet declared. What difference can it make with the rights of other men whether their debtor actually designed to defraud them in the particular transaction? Such a fact might be material in a proceeding to punish the debtor, since harm is more likely to happen when it is intended than when it is not.¹ The question here is one of rights only; if the debtor has done something impairing the rights of his creditors, the case is within the condemnation of the statute, though personal intention is not shown.

The Massachusetts doctrine requires the jury to find the intent of the *statute* in these cases, not the motive which governed the debtor. The judge may not be able to declare in absolute terms the line which divides the rights of the creditors from those of their debtor; he may be able to declare it only as a presumption, subject to a qualification which he leaves to the jury. In other words he asks the jury to find the line if evidence is given against the presumption. If evidence is not given to explain the facts,² or if the evidence given does not satisfactorily explain the facts, the line of the creditors' rights has been crossed by the debtor, and the intent of the statute is made out. So it is too wherever the line may be; the true question always is, What has the debtor a right by law to do? The objection to the Massachusetts rule is that the rights of creditors are abridged and

¹ See ante, p. 117, note 3, Holmes, J. tion of them. Ante, pp. 86, note 3, 87,

² And mere motive is not explanatory. note 2.

that they are not defined with certainty, not that it involves necessarily any peculiar conception of the meaning of fraud.

This last statement is shown by cases which the Massachusetts court speaks of as of an 'obviously illegal character and purpose.' Such cases are not merely evidence of an intent, they establish the intent;¹ and a contemporaneous example appears,² though it is not quite satisfactory, for the court was sitting as judge of fact as well as of law.³ A debtor had mortgaged 'all the hay, grain, and produce standing' on his farm, and, according to understanding, had retained possession and use of the same as if no mortgage had been made. Other creditors now attached, and their attachment was sustained, in replevin by the mortgagee. The court, laying down apparently a rule of law and not a mere inference of fact, said that articles consumable in the use might be mortgaged without any imputation of fraud, provided they were not to be used and might be kept without damage until the debt was due. But if they could not so be kept, 'or if they were mortgaged under an agreement or understanding that they may be used and consumed by the mortgagor . . . the transaction must be considered as collusive and fraudulent against credi-

¹ 'Cases may present themselves where the form of the conveyance and the stipulations of the contracting parties are of such obviously illegal character and purpose that it may be the duty of the court to pronounce them fraudulent in law and wholly ineffectual.' Dewey, J. in *Jones v. Huggesford*, 3 Met. 515. So in North Carolina, where the rule is only a little stronger than that of Massachusetts. *Boone v. Hardie*, 80 N. Car. 470, 474; *Cheatham v. Hawkins*, 80 N. Car. 161, 164. So in Michigan, it seems. *Oliver v. Eaton*, 7 Mich. 108, ante, p. 245.

² *Robbins v. Parker*, 3 Met. 117.

³ Examples from the case of assignments for creditors are at hand, clear

and pointed. *Harris v. Sumner*, 2 Pick. 129; *Platt v. Brown*, 16 Pick. 553; *Nostrand v. Atwood*, 19 Pick. 281, 285, 286; as to reservations for the debtor, see *infra*, p. 261, note. See also *Clark v. Jones*, 5 Allen, 379, where the court says: 'If the premises were conveyed to Mrs. W. . . . to defraud creditors, and the conveyance was made in secret trust for his own use and benefit, the proceeds of the land may be followed,' etc. So in *Bernard v. Barney Myroleum Co.* 147 Mass. 356, 359, the court speaks of the evidence as authorizing, 'if it did not in law require, the finding that the intent of both parties to the assignment was to hinder, delay, and defraud creditors of the company.'

tors. No other reasonable inference' could be made. This language, it should seem, would require an instruction to a jury to find the mortgage void in such a case; and so the decision appears to have been understood.¹

This admission, taken with the rule that the trust or reservation in the mortgage raises a presumption of fraud,² and that a reservation for the debtor in an assignment for all his creditors *establishes* fraud,³ may fairly be taken, notwithstanding some wavering,⁴ to show that the courts of Massachusetts do not hold that a personal intent in the debtor must be

¹ In *Hughes v. Cory*, 20 Iowa, 399, following the general Massachusetts doctrine, Dillon, J. for the court said that it followed from the statutes giving the mortgagor the right of possession that he might reasonably use the property where it was not necessarily consumed in the use.' See also *Sommerville v. Horton*, 4 Yerg. 541; *Simpson v. Mitchell*, 8 Yerg. 416; *Ticknor v. Wiswall*, 9 Ala. 305, 309; *Wiley v. Knight*, 27 Ala. 336; *Farmers' Bank v. Douglas*, 11 Smedes & M. 469.

This, as a matter of juristic reasoning, leads directly to the New Hampshire rule, for all the mortgaged chattels may disappear under the power of user and sale; and what matters it whether they are eaten up, used up, or sold and not replaced?

² See *Briggs v. Parkman*, 2 Met. 258, in which at p. 264, the court, after saying that retaining possession was only *presumptive* evidence of fraud, says by way of adjudication: 'But we consider the agreement as to the mortgagor's continuing in possession of the goods mortgaged, after the mortgage, and the permission to sell a part of the property, and to apply the proceeds to the mortgagor's own use, as evidence of the same character, and as tending to raise the same presumption; the one part of

the agreement may raise a stronger presumption of fraud than the other; but this is a difference only in the weight of evidence.' And on the following page the court says that 'if in the case of an absolute conveyance, the vendor should by the agreement be allowed thereafter to sell part, for himself, there would be strong presumptive evidence of fraud, and for aught that appears that would be conclusive.'

³ *Harris v. Sumner*, 2 Pick. 129. Putnam, J. at p. 133: 'It has been contended that it should have been left to the jury to decide upon the whole matter whether the conveyance were fraudulent or not. But where the defect is apparent upon the deed itself the effect of it becomes a question of law. It would be worse than useless to submit it to the jury to say, upon such evidence, whether it should be void against creditors or not, when, if they should happen to decide against the legal effect of the instrument, it would be the duty of the court to set aside the verdict.' *Murray v. Riggs*, 15 Johns. 588, Thompson, C. J. cited. *Harris v. Sumner* was followed in *Platt v. Brown*, 16 Pick. 553. See also *Nostrand v. Atwood*, 19 Pick. 281, 285, 286. It has never been doubted.

⁴ See the language quoted from *Jones v. Hingeford*, ante, p. 253, note.

found. The presumption, which is itself a rule of law and a definition, is not founded upon any idea of the kind, but upon the idea that in the ordinary course of things such transactions are contrary to fair conduct towards other creditors. The presumption could not be met, it seems, by any offer, unsupported by other evidence, of testimony by the debtor that he did not intend to defraud. It could be explained away only by external facts, not by motives.¹ Indeed if the test of liability may be found in external facts, for the purpose of a positive declaration of law by the judge, it must be external for the purposes of the jury. Or conversely if there is no question of personal intent in a case to be decided by the judge as matter of law, there is no question of *personal* intent in any case of the kind;² for the statute makes no double aspect of the intent,—the intent is a unit.

¹ Ante, pp. 86, note 3, 87, note 2.

² The language of the Supreme Court of North Carolina, in *Gregory v. Perkins*, 4 Dev. 50, 53, is pertinent in regard to cases which must go to a jury. 'It is not held,' said Ruffin, C. J. 'that the jury shall give to those intents, or to a delusive credit, such effect as to them may in each case seem proper. That the law declares; and the security of the creditors depends upon the fixed principles of the law, and not on the uncertain judgment of jurors as to what is covin.' The learned Chief Justice said that fraud was a 'word expressive of a legal idea, and admits of a legal definition; and therefore is correctly stated, as a general proposition, to be matter of law.' So in *Foster v. Woodfin*, 11 Ired. 339. See also *Hardy v. Simpson*, 13 Ired. 132, 139, 'what constitutes fraud is a question of law.' *Doe d. Otley v. Manning*, 9 East, 59, 64, Lord Ellenborough.

The language is pertinent because in North Carolina the question of intent

is treated as a question of fact unless the intent appears very plainly on the face of the instrument; where the intent does not so appear, there is at most only a *prima facie* presumption of intent; in other cases it is an ordinary question of fact, under the limitation laid down *supra* by Ruffin, C. J. See *Hardy v. Simpson*, *supra*; *Hardy v. Skinner*, 9 Ired. 191; *Cheatham v. Hawkins*, 76 N. Car. 335; *s. c.* 80 N. Car. 161; *Holmes v. Marshall*, 78 N. Car. 262; *Brown v. Mitchell*, 102 N. Car. 347, 368, 369.

When the case must go to the jury on the question of intent, they should be instructed to look to the ordinary, reasonable import of the facts as decisive. They should be asked whether the facts would import intent to hinder, delay, or defraud in the conduct or transactions of ordinary men; or, what amounts to the same thing, whether the debtor knew or had reasonable ground (*i. e.* the ground of a reasonable man) to know that his act would have the effect to hinder, delay, or defraud his credi-

Thus far the subject has been treated as though there were no difference between cases in which the objectionable feature appears upon the face of the instrument of transfer and cases in which it is made to appear by external evidence. Most of the authorities indeed treat the two cases as standing upon the same footing, where the trust or reservation, not appearing on the instrument, is shown to be contemporaneous with it.¹ And rightly, if the rule that such arrangements are fraudulent in themselves is sound; for the rule could be evaded in every case upon such a distinction. And in principle whether a fact is lawfully established in one way or in another cannot affect its intrinsic value.

Some of the courts however make that distinction, perhaps upon the ground that the rule which declares the trust or reservation in any case conclusive of a fraudulent intent is a very stern rule, too stern to be applied to cases not already adjudicated as within it. And so we find some courts, which had already held that the existence of the trust or reservation on the face of an instrument of transfer established the intent, afterwards holding that the rule should be limited to such cases and not applied to parol transactions.²

tors, — not whether he intended to hinder or defraud them. That is the true question indeed whether the decision rests with the judge or with the jury; except in cases of preference, where it makes no difference that there is an actual intention to defraud other creditors. Ante, p. 77; chapter 19, § 1. The matter is well put, with the distinction in regard to preference, in *Blum v. McBride*, 69 Texas, 60, 63, Stayton, J.

¹ See *Coburn v. Pickering*, 3 N. H. 415; *Griswold v. Sheldon*, 4 Comst. 580; *Edgell v. Hart*, 9 N. Y. 213; *Gardner v. McEwen*, 19 N. Y. 123; *Bank v. Talcott*, ib. 146; *Delaware v. Ensign*, 21 Barb. 88; *Southard v. Benner*, 72 N. Y. 424; *Potts v. Hart*, 99

Mass. 168; *Donnell v. Byern*, 69 Mo. 468; *Gaylor v. Harding*, 37 Conn. 508; *Freeman v. Rawson*, 5 Ohio St. 1; *Horton v. Williams*, 21 Minn. 187; *Stein v. Munch*, 24 Minn. 390; *Blakelee v. Rossman*, 43 Wis. 116; *Anderson v. Patterson*, 64 Wis. 557; *Gibson v. Love*, 4 Fla. 217; *Barnet v. Fergus*, 51 Ill. 253; *Orton v. Orton*, 7 Oreg. 478; *Jacobs v. Ervin*, 9 Oreg. 52.

² The following cases will illustrate what is said in the text: *Wiswall v. Ticknor*, 6 Ala. 178, an example of the New Hampshire doctrine, is limited to cases like it; trusts or reservations out of the deed not being conclusive evidence of fraud. *Ticknor v. Wiswall*, 9 Ala. 305; *Johnson v. Thweatt*, 18 Ala.

A different case arises where the trust or reservation is subsequent to the transfer. The objection may still attach to such trust or reservation, so as to avoid the subsequent transaction itself; but that fact would not necessarily affect the original transfer. The question is whether that transaction was fraudulent; and the subsequent one could only be evidence of fraud.¹ Nor could it be evidence thereof, unless a connection between the two transactions was sufficiently made out; and that would be difficult to establish in proportion to the distance of time and the difference of circumstances between them.²

741; *Constantine v. Twelves*, 29 Ala. 607; *Reynolds v. Welch*, 47 Ala. 200; *Commercial Bank v. Brewer*, 71 Ala. 574. And even when the trust appears on the face of the deed the rule is narrowed, as these cases show. So as to external facts, in Nebraska. See *Tallon v. Ellison*, 3 Neb. 63, and the limitation put upon the case in *Williams v. Evans*, 6 Neb. 216; *Gregory v. Whedon*, 8 Neb. 373. So in Missouri. *Johnson v. McAllister*, 80 Mo. 327. See also *Frankhouser v. Ellett*, 22 Kans. 127; *Cameron v. Marvin*, 26 Kans. 612.

The Alabama rule is thus stated in *Reynolds v. Welch*, supra: 'It is not sufficient that no fraudulent or improper motive influenced a creditor, and that he made the best arrangement he could to secure his debt. If he tie up more of his debtor's property than is sufficient to secure his debt, exempting it for an unreasonable time from his other creditors, and provide specially or as a result of law for a permanent benefit in the mean time to the insolvent . . . if there be creditors known to the parties, who may be delayed or hindered in the collection of their debts, and the necessary consequence of the transaction must be to hinder or delay them, the court is justified in inferring that the deed was

executed with fraudulent intentions. *Wiley v. Knight*, 27 Ala. 336.' See *Commercial Bank v. Brewer*, supra.

There must be serious difficulty in carrying out a rule with such provisions. No rule could be more simple in application than that of New Hampshire; and it is reasonably clear that none other is so conducive to honesty and fair dealing. By the New Hampshire rule the debtor may indeed prefer a particular creditor; but he must not at the same time prefer himself; whether he is insolvent at the time can make no difference; whether other creditors were known to exist at the time is immaterial; whether they are put off for an unreasonable time does not enter into the case.

¹ *Russell v. Winne*, 37 N. Y. 591; *Klapp v. Shirk*, 13 Penn. St. 589; *Hempstead v. Johnston*, 18 Ark. 123; *Horton v. Williams*, 21 Minn. 187. See chapter 19.

² But where the state of things has continued all along with the mortgagee's knowledge and consent, 'it is extremely difficult to resist the conclusion that the course of conduct on the part of the mortgagor was contemplated and intended by the parties when the mortgage was made. In *Barnet v. Fergus*,

Finally the New Hampshire rule requires that the objectionable character of the trust or reservation should be clearly made out. If either upon the face of the instrument of transfer, or in the facts without, it is not clear that the provision or arrangement impairs the rights of creditors, the fraudulent intent is not established ¹ for the burden of proof is upon him who alleges fraud.² 'Whensoever the words of a deed, or of the parties without deed, may have a double intendment, and one standeth with law and right and the other is wrongful and against law, the intendment that standeth with law shall be taken.'³

It follows, and it has already been intimated, that if the deed or the external arrangement merely looks to an agency on the part of the mortgagor on behalf of the mortgagee, the transaction is free from objection. The mortgagee is not required to manage in person the property mortgaged; and the mortgagor may as well be employed as another.⁴ The

51 Ill. 253, such a case was held to establish fraud.

¹ *Yates v. Olmsted*, 56 N. Y. 632; *State v. Tasker*, 31 Mo. 445; *Voorhis v. Langsdorf*, ib. 451; *Weber v. Armstrong*, 70 Mo. 217; *Hewson v. Tootle*, 72 Mo. 632; *Rice v. Jerenson*, 54 Wis. 249. In *Weber v. Armstrong*, supra, it is well held, overruling *Lodge v. Samuel*, 50 Mo. 204, that mere authority to retain possession does not give authority to use and appropriate as owner.

² Vol. 1, p. 123.

³ *Coke*, Litt. 42; *Townsend v. Sternes*, 32 N. Y. 214.

⁴ *Ford v. Williams*, 24 N. Y. 359; *Conkling v. Shelly*, 28 N. Y. 360; *Miller v. Lockwood*, 32 N. Y. 293; *Brackett v. Harvey*, 91 N. Y. 214; *Metzner v. Graham*, 57 Mo. 404; *Robinson v. Elliott*, 22 Wall. 513; *Crow v. Red River Bank*, 52 Texas, 362; *Wilson v. Sullivan*, 58 N. H. 260; *Pettee v. Dustin*, ib. 309; *Kleine v. Katzenberger*,

20 Ohio St. 103; *Fisk v. Harshaw*, 45 Wis. 665; *Murray v. McNealy*, 86 Ala. 234; *Peter's Saddlery Co. v. Schoelkopf*, 71 Texas, 418; *Macomber v. Parker*, 14 Pick. 497; *Melody v. Chandler*, 12 Maine, 282; *Abbott v. Goodwin*, 18 Maine, 408; *Cutter v. Copeland*, ib. 127. With this rule comp. that of Virginia, referred to ante, p. 232, note. Further see *Wilcox v. Landberg*, 30 Minn. 93; *Kreth v. Rogers*, 101 N. Car. 263.

Compensation for the debtor's services may be provided for in the way of a commission on sales. That would not be a reservation out of the property, for the debtor, because it would not vest immediately upon the execution of the instrument; it would have to be earned. *La Belle Wagon Works v. Tidball*, 69 Texas, 161. So of allowing a *reasonable* salary for services in winding up the business. *Smith v. Craft*, 123 U. S. 436; *Wilcoxon v. Annesley*, 23 Ind. 285.

circumstance however would be one for scrutiny as affording special means of evading the law.¹ Nor is it necessary that the proceeds to be turned over should be cash; they may themselves be securities.² In some of the authorities indeed objection has been made by the courts to the value if not to the legal sufficiency of undertakings of the debtor to account;³ but on the whole such undertakings must be treated as offsetting, presumptively at least, the inference of fraudulent intent which without them might arise, and that too regardless of the question whether the proceeds are paid over in fact.⁴

For some purposes however there is a material distinction between fraudulent provisions appearing upon the face of the mortgage (and this would be true of other instruments as well), and contemporaneous or immediately following arrangements of a fraudulent character capable of being interpreted into the writing. Thus persons who claim under the writing alone, for value and without notice of the parol arrangement, will take free from the effect which that arrangement would have in the class of cases heretofore under consideration; that is, they will prevail over the creditors of the wrongdoer.⁵ But this is anticipating the saving of the statutes, to wit that purchase for value in good faith bars the right of creditors to overturn the transaction.⁶

If the subject under consideration in the foregoing pages has been rightly apprehended, it will be seen once more that in the 'intent' of the statute we are dealing with a term

¹ *Ford v. Williams*, 24 N. Y. 359, 364. Denio, J.: 'I would not advise a creditor to take a mortgage of such property, accompanied by such an agreement.' And see *Metzner v. Graham*, and *Claphard v. Bayard*, *supra*, where there was a provision for accounting but no accounting, and that was treated as fatal; *Frank v. Robinson*, 96 N. Car. 28.

² See *Lang v. Lee*, 3 Rand. 410; *Claphard v. Bayard*, 4 Minn. 533.

³ *Brackett v. Harvey*, 91 N. Y. 214; *Conkling v. Shelly*, 28 N. Y. 360; *Robinson v. Elliott*, 22 Wall. 524.

⁴ *Conkling v. Shelly*, *supra*; *Brackett v. Harvey*, *supra*. But see note 1.

⁵ *Baldwin v. Little*, 64 Miss. 126.

⁶ Chapters 18 and 19.

that has come to be a term of art, and that all the discussion in the books in regard to finding an intent to defraud is idle which proceeds upon the theory that 'intent to defraud' is to be understood in the popular sense. Again the result is to do away with the need of speaking of transactions within the statute, where there is no real intent to defraud, i. e. no intent to defraud in the popular sense, as cases of 'constructive' or 'presumptive' fraud, as if in strictness the statute did not reach them and they were only to be brought within its aim by a gloss. These are cases of actual fraud, within the meaning of the law, as much as if a sinister motive had been shown.¹

¹ This is the meaning, behind a somewhat obscure way of stating it, of the authorities which speak of transactions of the kind under consideration, in which there is no actual intention to commit fraud, as having on the whole a 'fraudulent character,' or as having an 'inherently fraudulent character and tendency.' See e. g. *Clow v. Woods*, 5 Serg. & R. 275, Gibson J.; *Pierce*, Mortgages of Merchandise, p. 17. In this the debtor is looked upon as the average man, and doing what in him would be fraudulent, there being an endeavor by A, with the help it may be of B, to alter the rights of C. Comp. the definition of fraud as a crime, in Stephen's General View of the Criminal Law, p. 76; post, chapter 26, § 10, note at end.

CHAPTER XI.

INTENT TO DEFRAUD CONTINUED: ASSIGNMENTS FOR CREDITORS.

EXCEPT in so far as the case of mortgages of goods in trade with power of sale for the benefit of the mortgagor may be based upon grounds of supposed requirements of business,¹ it would be fair to expect to find the conflicting doctrines just under consideration extending to other classes of cases in which debtors convey property to their creditors subject to benefits to themselves; and such in fact we find to be true. While the authorities at large do not align themselves as in the class of cases just considered, three doctrines, with some minor variations, again appear touching benefits to the debtor in cases of general assignments for creditors.

Indeed it is here, as we have already intimated, that we find three doctrines distinctly manifested; for it is here that the Virginia law, referred to in the preceding chapter, assumes its peculiarity. We have seen that in the leading Virginia case² the court had under consideration a deed of trust in favor of a creditor, which contained a provision 'completely adequate to the destruction of the avowed purpose of the deed.' Now this circumstance, though probably not regarded as a condition to the existence of a fraudulent intent, has in later cases been treated as making just such a condition, and the rule laid down accordingly that the deed is not to be declared fraudulent as matter of law where it does not contain any provision adequate to its own defeat.

• ¹ Ante, p. 248.

² Lang v. Lee, 3 Rand. 410, ante, p. 231.

The following case¹ illustrates the law of that state: A debtor in embarrassed circumstances executed a deed of trust in favor of his creditors, conveying land, slaves, and cut and growing crops. The deed contained a provision that it was not to be enforced for two years, meantime reserving the profits to the grantor; and the surplus proceeds of sale, after payment of the debts, were to be paid over to him. Here was the strongest kind of case for the non-assenting creditors; but the court, though regretting the rule,² felt bound by the course of decisions in the state to declare that the transaction was not fraudulent on its face, because the provision was not adequate to defeat the purpose of the deed.³

Under this rule creditors are at the mercy, within certain bounds, of the debtor. Debtors have only to provide by the deed for the payment of the debts by the end of some definite time, and to be careful to omit any provision inconsistent with such object, and they may then go on enjoying the estate as before, using or disposing of the profits as they go, until the end of the term designated.⁴ A power adequate to

¹ *Dance v. Seaman*, 11 Gratt. 778.

Allen, J. in *Dance v. Seaman*, supra: 'If the question presented by the record in this case were of the first impression in this court, it would be matter for grave consideration whether deeds of trust, such as those assailed by the bill of the appellees, did not contravene the spirit of the statute against fraudulent conveyances. . . . But these questions have been settled by a series of adjudications in this court.' See *Cochran v. Paris*, 11 Gratt. 348; *Skipwith v. Cunningham*, 8 Leigh, 271; *Lang v. Lee*, 3 Rand. 410.

³ See also the later and similar case of *Sipe v. Earman*, 26 Gratt. 563; also *Perry v. Shenandoah Bank*, 27 Gratt. 755; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580, 591; *Williams v. Lord*,

75 Va. 390; *McCormick v. Atkinson*, 78 Va. 8; *Wray v. Davenport*, 79 Va. 19; *Young v. Willis*, 82 Va. 291; *Saunders v. Waggoner*, ib. 316; *Armitage v. Rector*, 62 Miss. 600.

⁴ 'In case he [the debtor] shall postpone for a definite time the final consummation of the security he creates, and shall either expressly or by operation of law reserve to himself the use of the property during that time, he is not regarded as delaying or hindering his creditors, within the meaning of the law, because the interest so reserved is liable to creditors acquiring liens by judgments or executions. Nor is it material that a creditor may be compelled to resort to a court of equity for aid to subject the reserved interest. *Cochran v. Paris*, 11 Gratt. 348; *Dance v. Sea-*

defeat the purpose of the deed need not however be given in express terms, in order to make a case of fraud; if clearly implied, that is enough.¹ The case first cited is an illustration. The trustee in a deed of trust for creditors could sell the property only upon the written direction of the parties secured, and he was not to be responsible for the property until directed to sell. This was held fatal on the ground that it contemplated the possibility that there might be no demand for a sale.

The Virginia rule appears to obtain in terms in West Virginia.²

What was the New Hampshire doctrine in regard to mortgages of goods in trade must now be called, or give place to, the New York doctrine, and for two reasons, — first, because at common law creditors' rights were not fully upheld in New Hampshire,³ in the class of cases now under consideration, while they were in New York;⁴ secondly, because creditors' rights in this class of cases have had their chief vindication in the last-named state.

The New York doctrine is a plain protest against trusts or reservations in favor of the debtor, created under cover of a disposition by him of property in favor of his creditors, general or special. By that doctrine creditors' rights are invaded, and thus the intent of the statute of Elizabeth is

man, *ib.* 778.' *Samuels, J. in Quarles v. Kerr*, 14 Gratt. 48. See *Wray v. Davenport*, 79 Va. 19.

In North Carolina such a provision would make the assignment presumptively but not absolutely fraudulent. *Hardy v. Skinner*, 9 Ired. 191. See *Boone v. Hardie*, 87 N. Car. 72.

¹ *Perry v. Shenandoah Bank*, 27 Gratt. 755. Further as to assignments fraudulent on their face in Virginia or West Virginia, see *Landeman v. Wilson*, 2 S. E. Rep. 203 (W. Va.).

² See ante, p. 233, note 2.

³ See *Havens v. Richardson*, 5 N. H. 113 (and contrast with *Coburn v. Pickering*, 3 N. H. 415); *Hurd v. Silsby*, 10 N. H. 108.

⁴ Or as the case would naturally be put, because the doctrine of fraudulent intent absolute, i. e. as matter of law, was not at common law upheld fully in New Hampshire in relation to the present class of cases, and was so upheld in New York. As to these two ways of putting the matter, — from the point of view of creditors' rights and from that of fraudulent intent, — see ante, pp. 228, 229.

established, (1) by any provision in an assignment for creditors which gives back to the debtor, or allows him to retain and enjoy to his own use, or, speaking broadly, gives to him directly or indirectly¹ benefits out of, property which by the assignment is given to his creditors; provided that the fund or benefit in question is not a mere surplus which the law itself would give to the debtor by way of resulting trust or the like.² The intent of the statute is by the same doctrine established (2) by any provision in such an assignment which

¹ As by continuing a business in the name of another. *Haydock v. Coope*, 53 N. Y. 68. Or by a partnership assigning for the benefit of its creditors and preferring one of its own members to the indirect benefit of the assignors. *Welsh v. Britton*, 55 Texas, 118. See also as to such assignments *First National Bank v. Wood*, 45 Hun, 411; *Kayser v. Heaveurich*, 5 Kana. 324; and comp. *Fanshawe v. Lane*, 16 Abb. Pr. 71. But a partner, in making an assignment, may by New York law prefer the firm of which he is a member, if he receives no benefit out of the property turned over. *Crook v. Rindskoff*, 105 N. Y. 476, 482. At least if the individual creditors do not object. *Royer Wheel Co. v. Fielding*, 101 N. Y. 504, 510.

² In many of the states preferential general assignments are contrary to statute. See e. g. *Henderson v. Pierce*, 108 Ind. 462; *Farwell v. Jones*, 63 Iowa, 316; *Newmann v. Calumet & Hecla Mining Co.* 57 Mich. 97; chap. 22. But an attempted preference would not in Indiana invalidate the whole assignment. *Henderson v. Pierce*. In this case it is laid down that to render an assignment for creditors void on its face there must be some provision in direct conflict with an established rule of law, or expressly or by necessary inference calculated to defeat or delay creditors; the fact of provisions constructively invalid would

not avoid the assignment entirely. Further see *Redpath v. Tutewiler*, 109 Ind. 248.

The statute is in derogation of the common law, and has therefore, it seems, been strictly construed. See *Newmann v. Calumet & Hecla Mining Co.* supra. Preference in a partial assignment is therefore thought proper under such statutes. *Grubbs v. Morris*, 103 Ind. 166; *Cushman v. Gephart*, 97 Ind. 46; *Newmann v. Calumet & Hecla Mining Co.* supra. But see chap. 22, § 1.

On the difference between an assignment and a bill of sale or a mortgage see *Brown v. Guthrie*, 110 N. Y. 435; *Dessar v. Field*, 99 Ind. 548; *De Wolf v. Sprague Manuf. Co.* 49 Conn. 282; *Hall v. Linn*, 8 Colo. 264; *Solomon v. Sparks*, 27 Ga. 385; *Wood v. Franks*, 67 Cal. 32; *Lawrence v. Neff*, 41 Cal. 566; *Eskridge v. Abrahams*, 61 Ala. 134; *Otis v. Maguire*, 76 Ala. 295; *Watts v. Eufaula Bank*, ib. 474; *Parsons v. Johnson*, 84 Ala. 254; *Parsell v. Thayer*, 39 Mich. 469; *Powell v. Kelly*, 82 Ga. 1; *Greene v. Remington*, 72 Wis. 648; *Ingram v. Osborn*, 70 Wis. 184; *Noyes v. Quale*, ib. 224; *Chicago Coffin Co. v. Maxwell*, ib. 282. A mortgage executed a few days before an assignment is not invalid, as virtually constituting a preference in the assignment. *Stix v. Sadler*, 109 Ind. 254. See *Fisher v. Syphers*, ib. 514.

requires a creditor to release the debtor from the payment of any part of his debt.

There was indeed a time when the New York courts were not ready to take this position fully in regard to the reservation of benefits to the debtor out of the funds conveyed by the deed of assignment. Thus in one well-known case¹ the Court of Errors, reversing a judgment of Chancellor Kent,² sustained an assignment for creditors in which a provision was made for the support of the debtor's family out of the property assigned.³ But that decision, after being shaken with doubts,⁴ was in the year 1841 considered to have been overturned,⁵ and in 1844 was declared to have been 'plainly overruled.'⁶

The court of Pennsylvania had, before the disturbing doubts in New York, already settled this question in accordance with the rule which finally prevailed in the latter state; and that too in a case⁷ in which the assignment on its face

¹ *Murray v. Riggs*, 15 Johns. 571.

² *Riggs v. Murray*, 2 Johns. Ch. 564, 582.

³ See *Green v. Branch Bank*, 38 Ala. 643; *Mass. Pub. Sts. c. 157, § 99*.

⁴ *Austin v. Bell*, 20 Johns. 442, 447; *Mackie v. Cairns*, 5 Cowen, 530, 557; *s.c.* 1 Hopk. 373; *Grover v. Wakeman*, 11 Wend. 187, 196; *Green v. Trieber*, 3 Md. 11, 32.

⁵ *Butler v. Van Wyck*, 1 Hill, 438, 463.

⁶ *Goodrich v. Downs*, 6 Hill, 438, 440. Bronson, J. for the court: 'I know it was held in *Murray v. Riggs*, 15 Johns. 571, that the reservation of an annual sum for the maintenance of the assignors did not render the deed absolutely void. But that case stands upon no principle, and it has been plainly overruled by those cases which have followed it. To say that an insolvent debtor can put any portion of his property, not exempt by law, beyond the reach of creditors, for his own benefit, is a monstrous proposition. In

the language of Chief Justice Savage in *Mackie v. Cairns*, 5 Cowen, 530, 584, "it offends the moral sense; it shocks the conscience, and produces an exclamation. It is directly against the statute, and cannot stand before it." And the Court for the Correction of Errors agreed with him in opinion. The whole subject was again reviewed by the same court in *Grover v. Wakeman*, 11 Wend. 187, where it was held that although the debtor may, by an assignment of his effects, give a preference among creditors, it can only be done where the assignor parts with all control over the property and devotes it absolutely to the benefit of his creditors, without any reservation or stipulation for his own advantage. Such must be the law wherever the least regard is paid to honesty and fair dealing.' See also *Sutherland v. Bradner*, 115 N. Y. 410; *Chapin v. Thompson*, 89 N. Y. 270, 280; *Griffin v. Barney*, 2 Comst. 371.

⁷ *McAllister v. Marshall*, 6 Binn. 338.

was free from objection. An insolvent debtor had made an assignment for creditors, with an understanding, shortly afterwards carried out by reconveyance, that part of the property assigned should be conveyed to trustees for the use of the debtor's wife and children. The property in question was seized on execution by a non-assenting creditor and sold to him at sheriff's sale; and the court sustained the sale, declaring the reconveyance fraudulent and void, under the statute of Elizabeth, without regard to the motive to the transaction.¹

In a somewhat later case² in the same state the jury had been instructed, in regard to an assignment proper on its face, to this effect: If the assignment, though made to the assignees in consideration of debts due to them, was made on condition that the debtor should receive a benefit either by the return of part of the property, or by a loan of the same, the assignment was fraudulent and void. This instruction was upheld. Assuming the existence of the condition, the case was considered to come to this: If a non-assenting creditor levied upon the property, the deed was produced, making title in the assignees; and yet the debtor was entitled to part of it; the case fell 'directly within the words and spirit of the statute of 13th Elizabeth.'

Suppose however that the provision in favor of the debtor, or of his family, is discretionary; will this save the assignment?³ It seems that if the discretion given is not arbitrary, i. e. beyond the control of the courts, but only a 'sound discretion,' that the provision will not invalidate the assignment; for so long as the action of the trustee or assignee is within

¹ Tilghman, C. J. : 'If the trust deed be supported, it will be an inducement for every insolvent debtor to insist on a provision for his family. And he will accomplish his object if he can but prevail on a number of creditors, who have debts equal to his whole estate, to accept

his offer. There will not be wanting powerful motives to join in this scheme. Each creditor will reflect that if he refuse he may lose everything.'

² Passmore v. Eldridge, 12 Serg. & R. 198.

³ See ante, pp. 216-218.

the control of the courts, the rights of creditors cannot, in a proper administration of the law, be impaired.¹ And in order to justify a creditor in taking the position that the control of the courts is taken away, the language of the provision should be very clear; for between two equally possible constructions of a written instrument, one of which would render it invalid while the other would support it as lawful, the latter construction should prevail.² Fraud is not made out by anything short of clear evidence.³

The English authorities appear to sustain discretionary trusts in favor of the debtor, in compositions with creditors,⁴ without regard to the question whether the action of the trustee is left within the control of the courts; at all events they make no allusion to any such qualification. Enough, it seems, that the debtor has himself given up all control over the property. In a case⁵ often cited Vice-Chancellor Wood, afterwards Lord Hatherley, is reported to have been of opinion that a voluntary deed by a debtor, made for the benefit of his creditors, was not fraudulent against (subsequent) creditors by reason of a trust in it to apply the interest of the property in such a manner as the trustees should think fit towards the benefit of the debtor or his wife or children. The fact that the deed was voluntary would be ground for investigating the transaction fully; but if the debtor had in good faith parted with all control over his property, and had vested it in trustees, 'in order to give them the absolute power to deal with it as they please for the benefit of himself or his

¹ Robbins v. Butcher, 104 N. Y. 575, and cases in next note. Further, post, pp. 283, 284.

² 'Whosoever the words of a deed, or of the parties without deed, may have a double intendment, and one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken.' Coke, Litt. 42; Town-

send v. Sternes, 32 N. Y. 214; Benedict v. Huntington, ib. 219; Wilson v. Robertson, 21 N. Y. 587, 589; Kellogg v. Slauson, 11 N. Y. 302.

³ Vol. 1, pp. 142, 145.

⁴ An *assignment* for creditors would in England be an act of bankruptcy, and hence invalid. Post, p. 292, note 3.

⁵ Holmes v. Penney, 3 Kay & J. 90, ante, pp. 215-218.

wife or children, that could not be held to be fraudulent against subsequent creditors of the settlor any more than if it were a settlement simply for the benefit of the wife and children of the settlor.' It was not intended, it seems, to make any distinction in regard to subsequent creditors. Such were only chiefly concerned; in point of fact there was one unpaid creditor, the plaintiff, whose debt was prior to the deed.¹ Indeed it appears to be the common practice in England to provide a discretionary trust in favor of the debtor in *compositions* arrangements with part of his creditors, to the effect that the dividends of non-assenting creditors may, if the trustees think fit, be paid over to the debtor; and the trust is there treated as not obnoxious to the statute of Elizabeth.²

When however an absolute trust of the kind is created, that is to say, when the provisions of the instrument require the trustee to pay over the dividend of a non-assenting creditor to the debtor, then, it seems, the whole transaction is invalid.³ Though the non-assenting creditors might reach the debtor's claim to the dividend, or the proceeds when paid over to him, they would be delayed necessarily until the dividend was declared; such delay they could not be compelled to make

¹ All the old creditors had been paid off but one, in accordance with the arrangement, before the suit was brought. The debt of that one had been concealed by the debtor; but the deed was upheld against him as well as against subsequent creditors. The deed however was for value, and what was said in regard to voluntary conveyances was not necessary to the case. As to the claims of subsequent creditors, see ante, pp. 88-108.

² *Boldero v. London Loan Co.* 5 Ex. D. 47. Pollock, B. spoke of trusts of the kind as 'ordinary trusts.'

³ *Spencer v. Slater*, 4 Q. B. D. 13. But in this case there was an additional provision requiring the assenting credi-

tors to indemnify the trustees against any personal risk they might sustain except by their own wilful neglect or default. See also *Boldero v. London Loan Co.* 5 Ex. D. 47, conceding the validity of indemnification provisions if they do not go too far.

With the distinction in favor of discretionary trusts may be compared some few cases in this country which draw a distinction between agreements for benefits in favor of the debtor, such as that the mortgagor of a stock of goods may continue to sell for himself, and *permission* or instructions given to him take the benefits, as 'to go on and sell as usual and make remittances' on the debt. *Fisk v. Harshaw*, 45 Wis. 665.

(assuming that the law has not already made the delay necessary) in a case not in bankruptcy or insolvency. The debtor may purposely and actually delay and entirely defeat certain creditors by preferring others, when not forbidden by law; but he can so delay or defeat them in so far only as that is the consequence of preference in itself, unless indeed the law has been otherwise established.

Apart from cases of provisions for the support of the debtor, or of his family, it has been consistently held from the first in New York that provisions for giving back, or provisions reserving, to the debtor, out of the fund assigned, benefits which would not result to him by operation of law establish a fraudulent intent in the execution of the assignment.¹ And this doctrine, without exception of provisions for supporting the debtor, obtains in many other states;² assuming that the trust was expressly or by clear implication an object of the transaction.³ In the leading case⁴ in New York an assignment had been executed by insolvent debtors in trust, first to satisfy a debt due to A; secondly, to pay all the other creditors proportionately upon their releasing their demands, but if any of these creditors refused, then this part of the trust should cease; thirdly, in the event last named,

¹ *Sutherland v. Bradner*, 115 N. Y. 410; *Collomb v. Caldwell*, 16 N. Y. 484; *Barney v. Griffin*, 2 Comst. 365; *Goodrich v. Downs*, 6 Hill, 438; *Hyslop v. Clarke*, 14 Johns. 458.

² *Green v. Trieber*, 8 Md. 11; *Malcolm v. Hodges*, 8 Md. 418; *Bridges v. Hindes*, 16 Md. 101; *Whedbee v. Stewart*, 40 Md. 414; *Price v. Pitzer*, 44 Md. 521; *Bigelow v. Stringer*, 40 Mo. 195; *Woodward v. Solomon*, 7 Ga. 246; *Menton v. Adams*, 49 Cal. 621; *Collier v. Davis*, 47 Ark. 406; *McReynolds v. Dedman*, ib. 347; *Piereson v. Manning*, 2 Mich. 445 (see *Palmer v. Mason*, 42 Mich. 146); *Price v. Haynes*, 37 Mich. 487; *Greely v. Dixon*, 21 Fla. 413; *West v. Snodgrass*, 17 Ala. 549; *Kayser v. Heavenrich*, 5 Kans. 324; *Richardson v. Marqueze*, 59 Miss. 80; *Truitt v. Caldwell*, 3 Minn. 364; *Gardner v. Commercial Bank*, 13 R. I. 155; *Gardner v. Commercial Bank*, 95 Ill. 298; *Howell v. Edgar*, 3 Scam. 417; *Holmes v. Mitchell*, 78 N. Car. 262; *Moore v. Hinnant*, 89 N. Car. 455; *Thompson v. Parker*, 83 Ind. 96 (statute concerning assignments); *Spencer v. Slater*, 4 Q. B. D. 13. See *Gould v. Hurts*, 61 Iowa, 45.

³ *Curtis v. Putnam*, 15 N. Y. 9; *Godchaux v. Milford*, 26 Cal. 316; *Reynolds v. Crook*, 31 Ala. 634.

⁴ *Hyslop v. Clarke*, *supra*.

the trustees, after paying A, were to pay the residue to such of the creditors as the debtors should appoint, and the overplus, in any event, to the debtors. The provision for the termination of the trust in regard to such other creditors was held fatal to the assignment; for then the fund would be held in trust for the debtors. Whether the non-assenting creditors could obtain relief in equity—it was thought that they could not—was declared immaterial;¹ the debtors had no right to place their property so as to prevent their creditors from taking it at law, unless under very special circumstances. And the rule under consideration is one of substance, applying therefore as well to cases of contemporaneous agreements out of the deed, as e. g. for a loan of part of the property to the debtor.²

The rule in this case in regard to a surplus not provided for by the (general) assignment, where creditors intended by it refuse its terms, that such surplus is then held in trust by implication for the debtor, obtains in other states; and this shows the intent of the statute as well as if the trust had been created by express language, whatever the actual purpose of the debtor may have been.³ If that were not so, the law

¹ See 2 Kent, Com. 534.

² Haydock v. Coope, 53 N. Y. 68, explaining Spaulding v. Strang, 37 N. Y. 135, and 38 N. Y. 9.

³ Collier v. Davis, 47 Ark. 347, overruling Clayton v. Johnson, 36 Ark. 406; Pierson v. Manning, 2 Mich. 445; West v. Snodgrass, 17 Ala. 549; Malcolm v. Hodges, 8 Md. 418; Bridges v. Hindes, 16 Md. 101; Whedbee v. Stewart, 40 Md. 414. See Hall v. Denison, 17 Vt. 310, 318, as to the trust resulting; also Gould v. Hurts, 61 Iowa, 45; Palmer v. Mason, 42 Mich. 146, distinguishing Pierson v. Manning, supra, as applying to general assignments only. Contra where the trust was no object of the transaction,

as in respect of the surplus of a mortgage not grossly excessive. Godchaux v. Milford, 26 Cal. 316.

It is laid down in Alabama that where the assignment appropriates the property unconditionally to the payment of certain preferred debts, and the residue *pari passu* to all other creditors who shall within six months execute the deed, the transaction is not vitiated by the implied reservation of such residue to the debtor, in the event of the latter class of creditors failing or refusing to comply with the conditions prescribed. Brown v. Lyon, 17 Ala. 659, citing Goodrich v. Downs, 6 Hill, 438. *Sed quære.*

might always be evaded and nullified, by simply omitting any provision concerning the surplus.

On the other hand, where any surplus is actually reserved, it has been held not to affect the case at all (where creditors' rights have not been cut down by law), that it is probable that no surplus will result, or that in point of fact it turns out that there is no surplus. The intent of the statute has regard to what was contemplated when the transaction took place; it is enough therefore that a surplus was contemplated, in making the assignment. After that, the parties are not at liberty to say that this was a mere form without meaning.¹ And the assignment may be overturned, if this is sound doctrine, by immediate proceedings; for the refusing creditors, in the face of such a provision, could not be compelled to wait, it may be for a very long time, and see whether there is a surplus. Fraud under the statutes against fraudulent conveyances does not turn upon ultimate results, but upon 'intent.' This of course assumes that the case is one in which,

¹ *Griffin v. Barney*, 2 Comst. 371. Bronson, J. quoted in *Collomb v. Caldwell*, 16 N. Y. 484, 486: 'And although it should ultimately turn out that there is no surplus, still the illegal purpose which destroys the deed is plainly written on the face of the instrument, and there is no way of getting rid of it.' In his valuable book on *Fraudulent Conveyances*, § 327, 2d ed., Mr. Wait appears to doubt this doctrine, and refers to *Hubler v. Waterman*, 33 Penn. St. 414, as opposed; but that was only a case of reserving any surplus after *all* the creditors were paid off. So of the Nebraska case which he cites. See however *Shebel v. Bryden*, 114 Penn. St. 147, 152, which is opposed to *Griffin v. Barney*.

In *Crook v. Rindskopf*, 105 N. Y. 476, 481, however the doctrine is put as one in which 'it has in some cases been' held; but it is not actually impugned.

The morality of Bronson, C. J. is stern, as indeed it should be; it had been better if all the courts had been animated by the same hostility to fraud.

It may be observed that it has lately been declared, on special consideration of the subject, that one may be convicted of an attempt to steal by putting one's hand into another's pocket, for the purpose of stealing, though there was nothing there to be stolen. *Regina v. Brown*, 21 Q. B. D. 357. 359, overruling *Regina v. Collins*, L. & C. 471; 33 L. J. M. C. 177, and *Regina v. Dodd*, an unreported case in regard to attempts. But see *People v. Moran*, 54 Hun, 279. Intent to defraud, in dealing with one's exempt property, is a different thing; the intent could not take away the exemption and give the property to creditors. Ante, pp. 51 et seq. But it might be evidence of fraud for some purposes.

if there *were* a surplus, it would be fraudulent to provide for a return of the same to the debtor-assignor.

In one of the cases cited,¹ as stated in another of them,² a large estate had been conveyed by a failing debtor in trust to pay part of his creditors, and then to reconvey to the debtor so much of the estate as should remain undisposed of. The bill set forth the conveyance and charged fraud, which the answer explicitly denied; no evidence was taken. It was alleged in the answer and not denied that there would be no surplus after paying the specified debts. The assignment still was held void on its face. It was enough that the parties had contemplated a surplus, and had provided that it should be returned to the debtor. However it is held of provisions in partnership assignments, for the payment of individual debts of the partners which might prejudice the partnership creditors, that it will rebut the inference of fraudulent intent to show that there were no debts of the kind.³

It is held that in the case of transfers by debtors to *particular* creditors, as distinguished from general assignments,⁴ the debtor may expressly reserve to himself the surplus remaining after satisfying his debt (a trust or benefit to the debtor not being the object or one of the objects of the transaction), because the law itself would create a resulting trust in his favor in regard to it.⁵ That of course assumes

¹ *Barney v. Griffin*.

² *Collomb v. Caldwell*.

³ *Crook v. Rindskopf*, supra, at p. 482, *Ruger, C. J.* citing *Turner v. Jaycox*, 40 N. Y. 470; *Bogert v. Haight*, 9 Paige, 297. So also of cases in which property formerly belonging to the partnership had become by purchase the property of the partners who made the assignment, and is turned over by way of preference to the firm. *Ib.*; *Dimon v. Hazard*, 32 N. Y. 65, 68. Further see *Hulbert v. Dean*, 2 Keyes, 97.

⁴ A general assignment, with provision for return of surplus before satisfaction of all debts, would be void on its face, by the New York rule. *Sutherland v. Bradner*, 115 N. Y. 410. Nor after creditors' rights had actually attached, as by lien, could the assignment be corrected even on the footing of innocent mistake in the scrivener. *Ib.*; *Farrow v. Hayes*, 51 Md. 498; *Whitaker v. Williams*, 20 Conn. 98.

⁵ See *Palmer v. Mason*, 42 Mich. 146; *State Bank v. Chapelle*, 40 Mich.

that the preference itself, apart from the question of surplus, was lawful; it may indeed be unlawful, as trenching upon some other law, such for example as a statute concerning assignments for creditors,¹ a statute of insolvency, or a statute of bankruptcy. The same is true in regard to provisions for a return of the surplus in a general assignment for creditors; if the assignment itself is lawful, the fact that the instrument provides for a return of the surplus after satisfying the claims of *all* the creditors is not objectionable, because the law would require such return.² So, for the same reason, a provision saving to the debtor property exempt by law, or its equivalent in value,³ shows no intent to defraud, and is valid.⁴

The same doctrine obtains very widely, in some states by statute,⁵ in regard to cases in which the debtor-assignor requires his creditors to release him from his debts, where the fund assigned is not sufficient to pay all the debts in full. The effect of such a requirement is the same in principle as

447; *Rowland v. Coleman*, 45 Ga. 204; *Dessar v. Field*, 99 Ind. 548; *Anderson v. Lachs*, 59 Miss. 111. As to other provisions equivalent to what would be authorized by law see *Watson v. Butcher*, 37 Hun, 391.

¹ See e. g. *Solomon v. Sparks*, 27 Ga. 385; *Watkins v. Jenks*, 24 Ga. 431; *Mathis v. Radcliff*, 28 Ga. 520. Such statutes are common. See chap. 23.

² *Cunningham v. Norton*, 125 U. S. 77, that it did not avoid the assignment that statute required that the surplus should be paid into court; *Hubler v. Waterman*, 33 Penn. St. 414; *Lawrence v. Norton*, 15 Fed. Rep. 853; *Moody v. Carroll*, 8 S. W. Rep. (Texas) 510; *In re Mann*, 32 Minn. 60; *Lininger v. Raymond*, 9 Neb. 40; *Morgan v. Bogue*, 7 Neb. 429; *Beatty v. Davis*, 9 Gill, 211; *Johnson v. McAllister*, 30 Mo. 327; *Hempstead v. Johnston*, 18 Ark. 123.

See *Farwell v. Maxwell*, 34 Fed. Rep. 727.

³ *Rainwater v. Stevens*, 15 Mo. App. 544; *Hildebrand v. Bowman*, 100 Penn. St. 580. See *Bausman's Appeal*, 90 Penn. St. 178.

⁴ *German Bank v. Peterson*, 69 Wis. 561; *Cribben v. Ellis*, 69 Wis. 337; *Muhr v. Pinover*, 67 Md. 480; *Hartzler v. Tootle*, 85 Mo. 23; *Anderson v. Lachs*, 59 Miss. 111.

⁵ E. g. in Alabama, Rev. Code. § 1866; *Price v. Mazange*, 31 Ala. 701; *Warren v. Lee*, 32 Ala. 440; *Stetson v. Miller*, 36 Ala. 642; *Longmire v. Goode*, 38 Ala. 577; *Campbell v. Hopkins*, 87 Ala. 179. Contra by statute in Maryland. Pub. Laws, Art. 48, § 13. And in Minnesota, *Denny v. Bennett*, 128 U. S. 489.

that of a provision for the return of part of the property or the like;¹ for the debtor has no better right to keep from his creditors his future accumulations than he has to keep his present. Some of the cases already referred to show this; many others may be added.² And the rule applies no doubt equally to contemporaneous agreements out of the deed.³

Assuming that the case is not affected by statute, as it has been in many states, it can make no difference, under the New York doctrine, whether the assignment professes to turn over all the debtor's property or only part of it. The principle is the same in both cases; all non-assenting creditors are of necessity delayed.⁴ The property is held by the trus-

¹ 'In my view the right, either legal or moral, of a debtor to provide in his assignment for a release from debts which he has not paid stands on no better grounds than a right to secure from his creditors a return of a certain percentage on the property distributed, or an engagement that his creditors shall give him a new credit.' Grover v. Wakeman, 11 Wend. 187, 198, 228; Howell v. Edgar, 3 Scam. 417, 422.

² Seaving v. Brinkerhoff, 5 Johns. Ch. 329; Lentilhon v. Moffat, 1 Edw. Ch. 451; Ames v. Blunt, 5 Paige, 13, 18; Grover v. Wakeman, 11 Wend. 187; Spaulding v. Strang, 38 N. Y. 9; s. c. 37 N. Y. 135; Haydock v. Coope, 53 N. Y. 68, 74; McConnell v. Sherwood, 84 N. Y. 522; Hurd v. Silsby, 10 N. H. 108; Ingraham v. Wheeler, 6 Conn. 277; Wheeler v. Evans, 26 Maine, 133; Pearson v. Crosby, 23 Maine, 261; The Watchman, Ware, 232; Howell v. Edgar, 3 Scam. 417; Ramadell v. Sigerson, 2 Gilman, 78; Conkling v. Carson, 11 Ill. 503; Hardin v. Osborne, 60 Ill. 98; Henderson v. Bliss, 8 Ind. 100, 108; Butler v. Jaffray, 12 Ind. 504; Hubbard v. McNaughton,

48 Mich. 220; Atkinson v. Jordan, 5 Ohio, 289; Brown v. Knox, 6 Mo. 302; Ingraham v. Grigg, 13 Smedes & M. 22; Green v. Trieber, 3 Md. 11; Graves v. Roy, 13 La. 454; Bennett v. Ellison, 23 Minn. 242; Miller v. Conklin, 17 Ga. 430; Wilde v. Rawlins, 1 Head, 34; Greely v. Dixon, 21 Fla. 412; Carlton v. Baldwin, 22 Texas, 724; Baldwin v. Peet, ib. 708; Clayton v. Johnson, 36 Ark. 406, reviewing the authorities, and deciding in favor of the assignment; 2 Kent, Com. 534. The rule in Alabama, which formerly permitted such stipulations, has been changed by statute. Perry Ins. Co. v. Foster, 58 Ala. 51.

In two or three of these cases there was the further provision that the surplus should be turned back to the debtor. Ingraham v. Wheeler, 6 Conn. 277; Howell v. Edgar, 2 Scam. 417.

³ Comp. Haydock v. Coope, 53 N. Y. 68.

⁴ Leitch v. Hollister, 4 Comst. 211; Wakeman v. Grover, 11 Wend. 187; s. c. 4 Paige, 23; Austin v. Bell, 20 Johns. 442; Hyslop v. Clarke, 14 Johns. 458; and most of the cases cited in the last note.

tees, and held effectively until a surplus is found after paying the assenting creditors, if the assignment is to be treated as valid. More than that, the professed purpose is to obtain a discharge on part payment; that is, where the debtor is supposed to be insolvent, as he ordinarily is in making an assignment. It is often said that this is 'coercive,' 'repressive,' and 'unjust;' and so it is. But the better way of putting it is that it is fraudulent. It is fraudulent in the plainest sense, for it is a scheme between A and B by which one of the two seeks to keep his property, present and future, from the reach of C his creditor. Indeed it could make no difference in principle that the estate of the debtor turned out to be solvent, for the very provision requiring a release contemplated a deficiency, thus showing the intent of the statute.

In several of the states however a distinction is taken between the two cases of partial and general assignments; stipulations for release in cases in which the debtor turns over but part of his property being held obnoxious to law, while in cases in which he has turned over all his property such stipulations are sustained.¹ This latter is sometimes due to statute, sometimes apparently to a feeling that the assignment works an equitable administration of laws of insolvency. So far as the rule rests upon the latter ground, it certainly is fallacious; for unless the proceeding is in insolvency or in bankruptcy, or under some special statute, it takes away the creditors' rights, quite as much as in cases where the assignment turns over but part of the debtor's property. Apart

¹ *Thomas v. Jenks*, 5 Rawle, 221; *In re Wilson*, 4 Barr, 430; *Gordon v. Cannon*, 18 Gratt. 387; *Skipwith v. Cunningham*, 8 Leigh, 271; *Rankin v. Lodor*, 21 Ala. 380; *McCall v. Hinckley*, 4 Gill, 128; *Green v. Trieber*, 3 Md. 11; *Rosenberg v. Moore*, 11 Md. 376; *Maughlin v. Tyler*, 47 Md. 545.

Legislation has changed the law of Pennsylvania. See *Burrill, Assign-*

ments, § 185; *Miners' Bank Appeal*, 57 Penn. St. 193; *Wiener v. Davis*, 13 Penn. St. 331.

It is held that to make a partnership assignment valid, with exaction of releases, the individual property of the partners, as well as the partnership property, must be turned over. *Cleveland v. Battle*, 68 Texas, 111, 115; *Donoho v. Fish*, 58 Texas, 169.

from statute creditors cannot in a proper administration of law be compelled to yield any of their rights, further than is necessary in the very nature of an assignment. Unless the case is brought within some other statute, the statute of Elizabeth governs the transaction, and avoids the circumventing endeavor.

Where the assignment contains a provision giving authority to the assignee or trustee to compromise or compound with creditors, in addition to the provision for a release, the case becomes obviously stronger against the instrument; for that is a case which looks to changing the very rate of distribution fixed upon by the other terms of the assignment. The creditors compounded with will receive either more or less than their distributive share under the general terms of the trust; none can know what may be done, or how far his rights will be interfered with.¹ The terms of the trust should leave nothing open or unsettled,² unless the contrary has become established law enlarging the rights of the debtor.

In a recent case³ in New York an assignment for creditors contained a provision that the assignee might have the right to compromise with the creditors, parties thereto, for all the debts and liabilities, if in the opinion of the assignee it would be advantageous to the debtor and to his creditors to do so. This was held to avoid the assignment, as being within the rule declared in cases of provisions for a release. The assignment was further considered to come within those cases in which trusts were held illegal because the assignee had been invested with some absolute or discretionary power beyond the appropriation of the assets to the payment of the debts, or in which 'the assignor reserved to himself a power over the

¹ *Wakeman v. Grover*, 4 Paige, 23, 41; s. c. 11 Wend. 187, 203; *McConnell v. Sherwood*, 84 N. Y. 522. This subject will be considered again, in a later chapter.

² *Ib.*

³ *McConnell v. Sherwood*, 84 N. Y. 522.

future direction of the trust fund, or an interest in it to be taken care of for him by the assignee.'

All that has been said applies equally to cases in which the assignment is intended for all the creditors, or for but part of them. The provision requiring a release contemplates in any case a part payment in discharge of the whole debt. That is an attempt at circumvention; and the assignment is a fraud not only upon such of the preferred creditors as refuse the terms, it is a fraud upon all the creditors alike. For it is to be remembered that it is not necessary, to enable a creditor to defeat a conveyance made by his debtor, that the conveyance should have been made to defraud that creditor; fraud upon one creditor is a fraud upon all.¹

Sometimes the provision for a release is attended with another, cutting off refusing creditors from all participation in the benefits of the assignment,² sometimes with one which only excludes the refusing creditors from the benefits of some preference offered to them. The New York courts would probably treat the two cases as standing upon the same footing, condemning both alike;³ this upon one and the same ground, of an attempt to impair or unsettle the rights of creditors. A, the debtor, makes over his property to B, and then says to his creditors, 'Accept the terms upon which I have transferred my property to B, and you shall have certain advantages; refuse and you shall have less, and perhaps nothing.' Any creditor may well declare this to be a scheme to unsettle his rights and so to circumvent him, and may seize the property. The most that the debtor can be allowed to do is to establish his preferences once for all, without con-

¹ Ante, pp. 88, 89.

² Wakeman v. Grover, 11 Wend.

³ Wilde v. Rawlings, 1 Head, 34; 187; s. c. 4 Paige, 23; 2 Kent, Com. Miller v. Conklin, 17 Ga. 430, 434; 536, note; Burrill, Assignments, § 195. treating such stipulation as fraudulent. Wakeman v. Grover decides that the debtor must settle his scheme, not leave it open to change. But see Heydock v. Stanhope, 1 Curtis, 471, on Rhode Island statutes; Jackson v. Lomas, 4 T. R. 166.

dition.¹ Other courts however allow the debtor to degrade the preferred creditors, upon their refusal, to the level of the rest for whom the assignment is also made.²

Thus far of the New York doctrine. At first the Massachusetts doctrine touching trusts and reservations in favor of the debtor, in these general assignments, appears to have been in accord with that of New York; indeed it followed the New York doctrine in terms. And taking the term 'trusts and reservations' in a narrow sense, the New York doctrine still obtains in Massachusetts. In the leading case³ of that state an insolvent debtor had executed an assignment of all his property to one of his creditors in trust to sell the same and out of the proceeds to pay the whole of the debt due to the trustee, a certain sum to the debtor, and to other creditors who should execute the instrument a certain proportion of the debts due them. The reservation in favor of the debtor was held to avoid the assignment as matter of law; the court, referring to a well-known New York decision,⁴ and declaring that where the defect was apparent upon the deed the question of its effect was a question of law. 'It would be worse than useless to submit it to the jury.'

¹ The rule appears to have been rather broadly interpreted in *Spaulding v. Strang*, 37 N. Y. 135, and 38 N. Y. 9. But see the explanation of that case in *Haydock v. Coope*, 53 N. Y. 68, 74.

² 2 Kent, Com. 533, 534, 536, note; Burrill, *Assignments*, § 195, 5th ed. Chancellor Kent, in the note just cited, declares that *Wakeman v. Grover*, supra, is 'the most stern decision that exists, either in England or this country, on the subject;' and he says that 'the weight of general authority, both English and American, is that an assignment by a debtor of all his property for the payment of his debts, and at the same time giving preferences, and re-

quiring an absolute release for each creditor who accedes, is not per se fraudulent and void.' But upon this it is safe to say, in the light of later events and of present practices, that *Wakeman v. Grover*, is justified, and that the state is safer under the stern rule, which after all is only the true rule in regard to fraud, than under a rule which encourages fraud. Preferences at best are only to be tolerated (see chap. 22), as the widespread legislation against them sufficiently shows; the debtor should not be able to prefer with a condition and so leave everything open and indeterminate.

³ *Harris v. Sumner*, 2 Pick. 129.

⁴ *Murray v. Rigge*, 15 Johns. 588.

Shortly afterwards however a distinction was taken¹ which, as a matter of principle, might be considered as an abandonment of this position, though it has not been so treated by the courts. An insolvent debtor assigned his property in trust for the benefit of all his creditors, upon condition that those only should be entitled to dividends who, within a certain time, should become parties to the assignment, and that the surplus, if any, and the dividends of non-assenting creditors, should be paid over to the debtor. It was held that there was nothing in this to make the assignment even *prima facie* fraudulent against the refusing creditors; the court declaring that the 'presumption' was that the object of the provision was to hasten the creditors and bring the business to a speedy conclusion.² And as this expresses the settled rule of law in Massachusetts, it will be seen that cases of this kind are not looked upon even with the degree of disfavor in which mortgages with benefits reserved to the debtor are regarded; the latter showing *prima facie* an intent to defraud.³

From one point of view the effect of the decision last stated is only this, that the courts of Massachusetts sanction the debtor's putting a species of pressure upon his creditors to cause them to assent to an assignment drawn up by himself, and the giving to the debtor a claim as creditor to lapsed dividends. So far as any rights of the debtor are concerned, in regard to such dividends, the decision, as interpreted by later cases, goes no further; there is no forfeiture, and there could be none under constitutional law, of the non-assenting

¹ *Andrews v. Ludlow*, 5 Pick. 28.

² 'This case is therefore not like the case of *Harris v. Sumner*, 2 Pick. 129 [supra], in which a large provision was secured to the debtor unconditionally.'

The same doctrine in regard to provisions for a return of a surplus by preferred creditors had been laid down by the court of Massachusetts as early as in the year 1810. *Stevens v. Bell*, 6

Mass. 339, 342, where it is said that if the property turned over is not excessive, 'no injury is done to other creditors, if there be a stipulation that the surplus over the debts and indemnities shall enure to the use of the debtors.' Parsons, C. J. This statement, it is probable, established the practice in Massachusetts.

³ *Ante*, p. 259.

creditors' rights; the lapsed dividends due the assignor do not become exempt from such creditors; if not already paid over, they may be attached by trustee (garnishment) process in the hands of the assignee,¹ and this though other creditors have afterwards agreed to the assignment.²

From another point of view the effect of the decision is different. The validity of the assignment (when not trenching upon statute) is recognized; and the assignee must accordingly have reasonable time for carrying it out, otherwise the assignment would be worthless and practically invalid. The result is that creditors are compelled, by act of the debtor not assented to, to forbear to sue; that is, the courts have sanctioned, and so made lawful, the attempt of the debtor, with the aid of one of his creditors, to cut down the rights of the other creditors.³ Creditors are not bound to assent to the assignment,⁴ but their rights are much abridged by law if they do not. And, whatever may be true of other cases, here there is a personal intent to delay them. It would be hard to reconcile all this with the statute of Elizabeth, that is, as an original question, before the law had as yet extended the rights of debtors; and as for the distinction between such a case, and a case in which a sum of money or a piece of property is to be given to the debtor-assignor 'unconditionally,' it would have been consistent to overrule the previous decision. If a creditor refuse to accept the assignment, the lapsed dividend becomes payable 'unconditionally' to the debtor, and the two cases are the same.

The distinction however, as we have before said, appears

¹ *Bradford v. Tappan*, 11 Pick. 76, 78; *Fall River Iron Works v. Croade*, 15 Pick. 11, 16; *Grocers' Bank v. Simmons*, 12 Gray, 440; *Leland v. Drown*, ib. 437. But even this right may be cut off by sale of the property under the assignment. *Leland v. Drown*, supra.

² *Bradford v. Tappan*, supra.

³ *Mechanics' Bank v. Eagle Sugar Refinery*, 109 Mass. 38. The fraud referred to in this case is fraud other than that of the text.

⁴ *Fall River Iron Works v. Croade*, supra.

still to obtain.¹ In the first case cited it appeared that an insolvent debtor had assigned his property, in consideration, as the deed stated, of a bond and notes. The assignee, it appeared, had given a bond, as part consideration, for the payment of the debts of the assignor, and for the rest four promissory notes, which were put into the hands of the assignor; that is, so much was to be paid back to him. The court held the deed void towards other creditors; it mattered not that the reservation did not appear upon the face of the deed.²

In Massachusetts the courts at first took the same position in regard to provisions for release as that maintained by the courts of New York. The leading Massachusetts case³ contains a well-considered examination of the subject by one of the masters of the law, Chief Justice Parsons. The case was replevin of a vessel, against an officer, who had attached the vessel in a suit by a certain creditor as the property of his debtors. The debtors, becoming insolvent, had executed to the plaintiffs, creditors, an assignment, by way of a bill of sale, of their property, including this vessel. The deed preferred certain creditors, who were to be paid in full, and provided that what was left should be distributed pro rata among other assenting creditors, on four conditions: (1) a release of every species of legal process which they might have commenced against the debtors; (2) adjustment of their demands by the plaintiffs, agents or attorneys appointed

¹ *Platt v. Brown*, 16 Pick. 553; *Nostrand v. Atwood*, 19 Pick. 281, 285, 286. See also *Quincy v. Hall*, 1 Pick. 357.

² *Wilde, J.*: 'The only distinction between that case [*Sumner v. Harris*, *supra*] and this is, that there the fraudulent reservation in favor of the assignor was apparent upon the face of the instrument itself, and in this case

the reservation was proved by other evidence. This fact being established by the verdict, — and it was left to the jury to decide upon it from the evidence, — we can see no distinction in principle between the two cases.'

³ *Widgery v. Haskell*, 5 Mass. 144. The case is vexed in Rand's edition of the Reports by a series of ill-informed and impertinent notes.

by the debtors; (3) a release of all their demands against the debtors; (4) notice of their assent, within six months. It was held that the plaintiffs' title-deed to the ship was fraudulent and void.

The court said that the deed purported to be made for the benefit of certain creditors, and then for the other creditors; but it was evident that the intent of the parties went much further,—it was intended 'to compel the discharge of the grantors from all their debts by locking up, from every creditor who would not discharge them, every part of the estate of the grantors.'¹ An insolvent debtor could not make a bankrupt law for himself. He might prefer one creditor to another; but even the preferred creditor could not be bound except by assenting. If he did not consent, nothing passed, and the property intended to be conveyed remained liable to attachment. Nor could the debtor convey his property in trust to pay his creditors without the creditors' assent.²

¹ To this there is a note in Rand's ed. of the Reports which shows that the editor did not fully understand the case. The 'intent' referred to by the court of course was not expressed by the deed; but the effect of the deed was as if such intent had been expressed,—it was the natural meaning of the provision for release. The debtors said to their creditors, 'Release us, or you shall have nothing; we give our property to trustees who will hold it, unless you accept our terms.'

It was also observed that it was not enough that the creditors should release, on part payment only; their claims must be adjusted, not by a jury of impartial men, but by the plaintiffs, who, being creditors, had an interest to cut down all the debts except those due to themselves.

To this passage there is another note quite wanting in point. But the provision for adjustment is no part of the

subject now under consideration; the sole question is of the effect of a requirement of release.

² The same learned judge appears however to have considered that there was a distinction between cases in which the debtor sought as now, by the terms of the assignment, to cut off refusing creditors from all benefit of the property turned over, and cases in which the creditors were only to release the debtor on his turning over to them all his property without reserve, from liability in respect of his future accumulations. For soon after the foregoing case was decided the Chief Justice said: 'At common law every man might prefer any creditor, and might pledge his property, and convey it in trust, so that no fraud resulted to others; and if he stripped himself of all his property in favor of any one creditor, leaving himself quite destitute, no other creditor had legal cause of complaint, if the

Although all this was said in a judgment evidently deliberate and considered, and apparently intended as an adjudication of the question, it has in later cases been observed that it was unnecessary to the determination of the case to decide that the provision for a release invalidated the assignment; for there were other grounds sufficient to sustain the actual decision against the plaintiffs. That is, the language of the court was no more than obiter dictum.¹ And later cases, for which this intimation prepared the way, have silently or expressly supported provisions for release.² This however is

transaction was honest and for a valuable consideration.' *Stevens v. Bell*, 6 Mass. 339, 342.

No doubt there is a wide-spread and rightful feeling in favor of such a distinction; all statutes of assignments, insolvency, and bankruptcy are founded upon it. The difficulty, as has been pointed out ante, p. 289, is that in cases *out* of statute the debtor, by the assignment, is seeking to make a bankruptcy law for himself; that is, he is endeavoring to compel his creditors to surrender their right to payment in full, — to the benefit of his future accumulations as well as to that of his present effects if the latter are not sufficient. Such right the creditors have, until statutes, and proceedings under statutes, have taken it away. In a word then the attempt to exact a release, being an attempt to impair rights, shows an intent to defraud.

¹ In *Borden v. Sumner*, 4 Pick. 265, 266, it was said concerning objection to a provision for release: 'This seems to have been one of the grounds for setting aside a similar conveyance in the case of *Widgery v. Haskell*, 5 Mass. 144, though in that case the question as to the validity of the assignment was limited to a ship, which was embraced within the general terms of the conveyance but was

attached before she came into the actual possession of the assignees. It was an important consideration too in that case that property to an amount sufficient to pay the demands of the creditors particularly provided for in the assignment, and those of the assignees themselves, who were also creditors, had been received, . . . so that the ship . . . was not needed for those purposes, and if the right of the assignees had been established, they could only have held in trust for the general creditors . . . It is not therefore a necessary inference from that decision that the clause in the assignment . . . rendered the whole conveyance void.'

² *Andrews v. Ludlow*, 5 Pick. 28; *Lupton v. Cutter*, 8 Pick. 298; *Nosstrand v. Atwood*, 19 Pick. 281. See *Halsey v. Whitney*, 4 Mason, 206, where it is considered that opinion and practice had fixed the rule in Massachusetts. At p. 230 of the report the learned judge indicates that his own opinion was adverse to the rule in Massachusetts. This case of *Halsey v. Whitney* has been much considered, and in the main unfavorably. See *Burrill, Assignments*, § 194, 5th ed.

Whether any distinction would be taken against stipulations for release where the assignment turned over but

consistent with the rule sustaining provisions for turning over to the debtor an unclaimed surplus; there is no distinction between a present return of property and a grant of future ease and enjoyment.

What has thus come to be accepted in Massachusetts has obtained for law in some other states.¹ Even the courts of New Hampshire, where the strict rule in regard to trusts and reservations in favor of the debtor has always obtained, at first followed the rule in Massachusetts in regard to provisions for release;² but afterwards the law was changed by statute.³ It is however to be remembered that the question in Massachusetts, as everywhere else, is one of the extent of creditors' rights; in Massachusetts, and wherever else the Massachusetts rule has been adopted, creditors' rights have been much abridged by the decisions of the courts, and credits must now be extended accordingly. What constitutes a fraudulent intent remains the same; it is made out when the debtor, with the aid of one or more of his creditors, goes far enough to cross the line which separates his rights from those of his other creditors.

part of the debtor's property does not appear; probably not. See *Nostrand v. Atwood*, 19 Pick. 281, apparently a case of partial assignment.

¹ *Hall v. Denison*, 17 Vt. 810; *Haven v. Richardson*, 5 N. H. 118; *Fox v. Adams*, 5 Greenl. 245; *Canal Bank v. Cox*, 6 Greenl. 395; *Lee's Appeal*, 9 Barr, 804; *Bayne v. Wylie*, 10 Watts, 309; *Mechanics' Bank v. Gorman*, 8 Watts & S. 304; *Sheepshanks v. Capen*, 14 Serg. & R. 35; *Wilson v. Kneppley*, 10 Serg. & R. 439; *Cheever v. Clarke*, 7 Serg. & R. 510; *Coakley v. Weil*, 47 Md. 277; *Maughlin v. Tyler*, ib. 545, if all the debtor's property is turned over; *Clayton v.*

Johnson, 36 Ark. 406, reviewing the authorities. In *Brashear v. West*, 7 Peters, 608, a case touching Pennsylvania law, the court felt bound to accept the view of the courts of that state, but did so reluctantly. Marshall, C. J. said: 'We are far from being satisfied that upon general principles such a deed ought to be sustained.' The law of Pennsylvania has since been changed by statute. See Burrill, *Assignments*, § 185, 5th ed. As to Minnesota law, which is statutory, see *Denny v. Bennett*, 128 U. S. 489, affirming *Bennett v. Denny*, 33 Minn. 530.

² *Haven v. Richardson*, *supra*.

³ *Hurd v. Silsby*, 10 N. H. 108.

CHAPTER XII.

INTENT TO DEFRAUD CONTINUED : ASSIGNMENTS CONTINUED : 'HINDER AND DELAY,' ETC.

It has well been said¹ that there is a necessary difficulty in sustaining assignments against the objection of creditors, even when as free as possible from all objectionable provisions, for of necessity the assignment delays the creditors ; there must be some delay in completing the arrangements for carrying the assignment into effect, and in upholding the trust the courts must require the non-assenting creditor to stay his hand until the trustee is appointed and has time to get in the estate.² So much is allowed by law for the sake of upholding a common practice.³ Further than this however the New York law will not go ; and if other delays are made necessary by the instrument, it will have no validity against those who refuse to accept its terms.⁴ There is then an

¹ Selden, J. in *Dunham v. Waterman*, 17 N. Y. 9.

² *Hanselt v. Vilmar*, 76 N. Y. 680. This is sometimes provided for by statute ; and in such cases it seems that creditors must await the completion of the assignment before attaching the property, though the assignment is itself alleged to be fraudulent. *Coots v. Radford*, 47 Mich. 37. .

In New York the creditor must have obtained and docketed judgment against his debtor before he can proceed against an assignment which is not more objectionable than any assignment in itself must be. *Spring v. Short*, 90 N. Y. 538.

³ In England a general assignment would be an act of bankruptcy, and so throw the whole matter into court, at the will of non-assenting creditors ; the assignment defeating itself. Bankruptcy Act, 1888, 46 & 47 Vict. c. 52, § 4, (a).

⁴ *Nicholson v. Leavitt*, 6 N. Y. 510 ; *Brigham v. Tillinghast*, 13 N. Y. 215, 220 ; *Dunham v. Waterman*, 17 N. Y. 9 ; *Jessup v. Hulse*, 21 N. Y. 168, 169 ; *Van Nest v. Yoe*, 1 Sandf. Ch. 4, 9 ; *Knight v. Packer*, 12 N. J. Eq. 214 ; *Gardner v. Commercial Bank*, 13 R. I. 155, 167 ; *Pierson v. Manning*, 2 Mich. 445 ; *McCleery v. Allen*, 7 Neb. 21.

In *Dunham v. Waterman*, Selden, J.

intent to defraud within the meaning of the statute against fraudulent conveyances; intent to hinder or delay is intent to defraud; 'hinder,' 'delay,' and 'defraud' are practical equivalents in the civil administration of the statute.¹

said: 'General assignments in trust for the payment of debts are, for the most part, an American device. . . . The history of these assignments in this state tends to show that they were originally an invention by debtors in failing circumstances, designed, not for the benefit of their creditors, but to perpetuate their own control over the property in their hands.' See also the language of Mr. Senator Tracy in *Grover v. Wakeman*, 11 Wend. 187, 218.

In *Tillinghast v. Brigham* the court says: 'The true rule to be observed is this: An insolvent debtor may make an assignment of all his estate to trustees to pay his debts, with or without preferences; but such assignees are bound to make an immediate application of the property. And any provisions contained in the assignment which shows that the debtor, at the time of its execution, intended to prevent such immediate application will avoid the instrument, because it was made with "intent to hinder and delay creditors in the collection of their debts." Such an intent, expressed in the instrument or proved aliunde, is fatal alike by the language of our statute and the well-settled adjudications of the English and American courts.'

Sales by an insolvent debtor on long and unusual credit having the necessary effect to delay creditors are invalid against them. *Roberts v. Radcliff*, 35 Kans. 502; *Kurtz v. Miller*, 26 Kans. 314, sale to son, having no property.

¹ To the objection-that an intent to delay or hinder was not an intent to defraud, the court in *Nicholson v.*

Leavitt, supra, said: 'A positive intent to defraud always does exist where the inducement to the trust is to hinder and delay creditors, since the right of a creditor to receive his demand when due is as absolute as the right to receive it at all.' That is, the intent to impair the right, or the 'endeavor to alter rights' of our definition of fraud, is an intent to defraud; it is actual and not merely constructive fraud, because it is the fraud of the statute. See also *Brigham v. Tillinghast*, supra; *Ogden v. Peters*, 21 N. Y. 23, 25, 'if the intention is to hinder or delay creditors, the transaction is fraudulent.'

The same doctrine is laid down by other courts. Thus in *Buck v. Sherman*, 2 Doug. 176 (Mich.), the court says that 'an express [i. e. personal] intent to commit fraud is not necessary in order to render a conveyance fraudulent as against creditors. It is sufficient if the effect of the conveyance is to delay or hinder creditors in the collection of their debts.' Later by the same court: 'If an assignment by a debtor in failing circumstances is drawn in such a manner as that it must necessarily, in its execution, tend to hinder or delay creditors unprovided for, in the collection of their debts, then the legal presumption arising upon the face of the instrument is that it was framed with that intent.' *Pierson v. Manning*, 2 Mich. 445, 454. The Supreme Court of Pennsylvania in *Mitchell v. Stiles*, 13 Penn. St. 306, 309, speaking also of assignments for creditors: 'Delay is incident to all human affairs. . . . But in this and all its kindred cases the delay is by the will of the grantor, and the hindrance

We have seen that it is no ground for objecting to conveyances in trust for creditors, according to Virginia law, that the creditors are put off (even with full enjoyment of the property by the debtor) for some definite period of time, which may be for several years; for that would not defeat the purpose of the trust,—the test of validity in that state.¹ In other states the rule is commonly stated in terms allowing the debtor to fix a reasonable time for getting in and dispos-

and obstruction to the creditors are stipulated for in the deed; a very different affair indeed [i. e. from delay 'incident to all human affairs']. And it is from this circumstance the law infers the intent.' See also *Rupe v. Alkire*, 77 Mo. 641; *Bixby v. Carakaddon*, 55 Iowa, 533. The shorter, and it is believed, more correct way of putting the case is to say, as we have elsewhere suggested, that the intent to defraud of the statute is a technical term, and is established by the doing of certain acts, one of which is an attempt by the debtor to extend the time of payment of his debt without the creditor's consent. Burrill seeks to show that the intent of the statute of Elizabeth is stronger than that of most of our American statutes, requiring for all three words alike, 'hinder,' 'delay,' 'defraud,' an actual personal intent. *Assignments*, §§ 332, referring to the special language of the context, 'devised and contrived,' 'purpose and intent.' But the modern English authorities are the effectual answer; 'intent,' as applied to each of the words, has become, if it was not always, a technical term in England as well as in the United States. See e. g. the much cited authority *Freeman v. Pope*, L. R. 5 Ch. 538; ante, p. 83; *Ex parte Jackson*, 14 Ch. D. 725, C. A.; ante, p. 10, note 3; *Ex parte Chaplin*, 26 Ch. D. 319, 331, C. A.; ante, p. 7, note 1. It

is true the last two cases related to bankruptcy law, but no distinction has ever been suggested on that footing. Burrill indeed admits, in the next section, that the law has been expounded in England as well as in this country contrary to his view. *Assignments*, § 333. So far as our statutes in general are concerned the learned author approves of the construction which gives to the word 'intent' the more liberal, i. e. technical meaning. *Ib.*, sub fin. So far as the penal aspects of the statute of Elizabeth are concerned there may be a distinction of the kind. See ante, p. 9.

Further it is clear enough, though the contrary has sometimes been supposed (see for instance *Burgert v. Borchert*, 59 Mo. 83; *Hickox v. Elliott*, 22 Fed. R. 21), that Parliament had no thought of any distinction between the words 'delay, hinder, or defraud'; they are simply alternative equivalents, used out of caution to make clear the meaning. Nothing was or is more common than to use equivalents in that way. 'Many such pleonasms [as hinder and delay] are to be found in old English statutes, where they are introduced for caution's sake, more than with any precise idea as to what they were intended to effect.' Robertson, J. in *Read v. Worthington*, 9 Bosw. 628.

¹ Ante, p. 232; *Cohn v. Ward*, 32 W. Va. 34.

ing of the effects,¹ since the law itself would allow such time.² The courts of New York would no doubt accept such a rule; the differences in the authorities would then relate to the interpretation of the rule. In New York the rule would be very narrowly interpreted; it would require the exercise of diligence in carrying out and terminating the business. A provision for 'all convenient despatch' would be proper, and advisable.³

What would constitute reasonable time would, at least under the New York rule, depend much upon the nature of the business and the situation of the property, viewed with regard to a speedy and diligent disposition of the trust; not, it should be observed, with a view to preventing a sacrifice, as by waiting for a rise in prices or a more favorable market.⁴ The

¹ *Rundlett v. Dole*, 10 N. H. 458; *Stevens v. Bell*, 6 Mass. 339, 343; *Adlum v. Yard*, 1 Rawle, 163; *Knight v. Packer*, 12 N. J. Eq. 214; *Hafner v. Irwin*, 1 Ired. 490; *Hardy v. Skinner*, 9 Ired. 191; *Perry v. Foster*, 58 Ala. 502; *Mitchell v. Beal*, 8 Yerg. 134; *Bennett v. Union Bank*, 5 Humph. 612; *Young v. Hail*, 6 Lea, 175; *Farmers' Bank v. Douglas*, 11 Smedes & M. 469; *Henderson v. Downing*, 24 Miss. 106; *Hempstead v. Johnston*, 18 Ark. 123.

² *Stevens v. Bell*, *supra*; *Hollister v. Loud*, 2 Mich. 309. See *Gore v. Clisby*, 8 Pick. 555, 559; *Hower v. Geesaman*, 17 Serg. & R. 251. So of other provisions giving no greater powers than the law would give. *Planters' Bank v. Clarke*, 7 Ala. 765, power to permit the debtor to hold and manage the property.

It is sometimes said that where no time is specified at all, a reasonable time is implied and the provision thus made good. See *Stevens v. Bell*, *supra*. But see 2 Kent, Com. 533, 'for if no time, or an unreasonable time, be prescribed, the deed is fraudulent.'

³ 'All convenient despatch was the best limit; and it put the execution of the trust under the control of a court of equity, and with it the conduct and fidelity of the trustee.' Nelson, J. in *Cunningham v. Freeborn*, 11 Wend. 240, 255. See also Burrill, *Assignments*, § 219, 5th ed.

⁴ *Van Nest v. Yoe*, 1 Sandf. Ch. 4, 8; *Ogden v. Peters*, 21 N. Y. 23, 25; *Jessup v. Hulse*, *ib.* 168, 171; *Means v. Dowd*, 128 U. S. 273; *Maughlin v. Tyler*, 47 Md. 545; *German Bank v. Nunes*, 80 Ky. 334; *Vernon v. Morton*, 8 Dana, 247, 263; *Ward v. Trotter*, 3 T. B. Mon. 1; *Knight v. Packer*, 12 N. J. Eq. 214; *Livermore v. McNair*, 34 N. J. Eq. 478; *Sutton v. Hanford*, 11 Mich. 513; *Palmer v. Mason*, 42 Mich. 146; *Bernard v. Barney Myro-leum Co.* 147 Mass. 356, 359; *Gardner v. Commercial Bank*, 95 Ill. 298; *Gardner v. Commercial Bank*, 13 R. I. 155; *First National Bank v. Hughes*, 10 Mo. App. 7; *Bigelow v. Stringer*, 40 Mo. 195; *De Wolf v. Sprague Manuf. Co.* 49 Conn. 282, 326; *Phelps v. Curts*, 80 Ill. 109; *Smith v. Conkwright*, 28

debtor cannot under that rule, and in principle cannot under any rule, impose such terms upon his creditors. They have in principle a right, which the debtor may not take away without their consent, to present satisfaction; for that is the contract. Any attempt to take away that right shows an intent to defraud. A common example is found in cases in which a really solvent debtor seeks, through an assignment with provisions for delay for better prices, to gain time and save himself.¹ But the New York rule unfortunately does not everywhere obtain.²

When it comes to the matter of prescribing a specific time there is much difficulty. The safer course for the debtor would be to require 'all reasonable despatch,' or the like, in terms. If this is not done, some short maximum limit of time, which may fairly be regarded as the *equivalent*, should be set down. Statute in some states has fixed the time to be allowed.³ Apart from statute two⁴ or three⁵ or four,⁶ and

Minn. 28; Lehman v. Kelly, 68 Ala. 192. But see Woodward v. Marshall, 22 Pick. 468, 474; Perry Ins. Co. v. Foster, 58 Ala. 502; Cannon v. Peebles, 2 Ired. 449, 455; Cason v. Murray, 15 Mo. 378; Waldron v. Wilcox, 18 R. I. 518, 521; Beatty v. Davis, 9 Gill, 211; Montgomery v. Galbraith, 11 Smedes & M. 555, authority to pledge in case of 'any pressing emergency.' See post, p. 311.

¹ See cases cited in note 4, supra; also Munson v. Ellis, 58 Mich. 331; Knapp v. McGowan, 96 N. Y. 75; Planck v. Schermerhorn, 3 Barb. Ch. 644, 646. In the last case Walworth, Ch. said: 'The creditors are entitled to payment in cash when their debts become due. And where a man has ample means to pay all his debts in cash as they become due, there seems to be no reason for making a general assignment, and giving preferences, except

for the purpose of delaying the creditors in the assertion of their legal rights.' See also Phelps v. Curtis, 80 Ill. 109; Gardner v. Commercial Bank, 95 Ill. 298; Gardner v. Commercial Bank, 18 R. I. 155, 167; Burt v. McKinstry, 4 Minn. 204, 215; Gore v. Murray, 6 Minn. 305; Keevil v. Donaldson, 20 Kans. 165. But see Ogden v. Peters, 21 N. Y. 23, post, p. 325.

² See cases at end of note 4, supra. Further see Hempstead v. Johnston, 18 Ark. 123.

³ Cotts v. Radford, 47 Mich. 37; Knight v. Packer, 12 N. J. Eq. 214, 218.

⁴ Hindman v. Dill, 11 Ala. 689. See Hafner v. Irwin, 1 Ired. 490.

⁵ Christopher v. Covington, 2 B. Mon. 357.

⁶ Cannon v. Peebles, 2 Ired. 449; s. c. 4 Ired. 204.

even nine¹ and eleven² months, and in one case³ two years have, by different courts, but not in New York, been held reasonable. On the other hand a provision for a delay of a year, to prevent a sacrifice, would be fatal in Kentucky,⁴ as it certainly would be in New York and probably in other states.⁵ A provision allowing three years before the sale of land would in Pennsylvania be fatal;⁶ so would a provision allowing three years under Tennessee law.⁷

Provisions conferring any arbitrary discretion upon the assignee or trustee, in the disposition of the trust property, or any discretion though not arbitrary which proceeds from the authority of the assignor independently of the courts, are equally objectionable according to the better authorities; unless indeed creditors' rights have actually been cut down so far as to allow the same. The assignee is considered in some sort a substitute for the officers of the law, and himself an officer of the court; and he must therefore be left subject entirely to the direction of the court.⁸ That is to say, those rights which the creditors have must be left to the protection of the law through its own agency of the tribunals of justice; for the debtor to attempt to take them out of the hands of the courts, where the law does not give him the right to do

¹ *Gilmer v. Earnhart*, 1 Jones, 559. See *Hempstead v. Johnston*, 18 Ark. 123.

² *Young v. Booe*, 11 Ired. 347.

³ *Rundlett v. Dole*, 10 N. H. 458.

⁴ *Ward v. Trotter*, 3 T. B. Mon. 1.

⁵ See *Sheerer v. Lautzerheizer*, 6 Watts, 543. But see *Farquharson v. McDonald*, 2 Heisk. 404; *Graham v. Lockhart*, 8 Ala. 9; *Dana v. Bank of United States*, 5 Watts & S. 223. And see *Robins v. Embry*, 1 Smedes & M. Ch. 207.

⁶ *Adlum v. Yard*, 1 Rawle, 163.

⁷ *Mitchell v. Beal*, 8 Yerg. 134. In *Young v. Hail*, 6 Lea, 175, Cooper, J.

said: 'The probable "law's delay" is all that can fairly be stipulated for.' See *Henderson v. Downing*, 24 Miss. 106, 116. In *Bennett v. Union Bank*, 5 Humph. 612, five years were given, and that was held not to establish fraud.

In regard to prescribing a time within which creditors are to assent, see *Burrill, Assignments*, § 217, 5th ed.

⁸ 'The assignor can neither prescribe conditions, nor invest the assignee with powers, which tend in any degree to vary or modify the duties which the law devolves upon him.'

Selden, J. in Jessup v. Hulse, 21 N. Y. 168, 169.

so, is to attempt to impair them, and that establishes an intent to defraud. Beyond conferring the legal title upon the assignee, and directing the order of disposition of the property, the debtor can, according to the better rule, exercise no control over the trust. Any provision which could be set up by the assignee in justification of a course of conduct, in regard to the property assigned, differing from that which the law would require, will avoid the assignment.¹

No intermediate ground can in principle be taken. The assignor, as a very learned judge has put the case, being the absolute owner of the property, and not obliged to assign, may annex such conditions and qualifications to the assignment as he will. If he annex improper conditions, the whole assignment must be pronounced void; the courts could not hold the transfer good, and disregard the condition, because that would be to take the assignor's property against his will. He has consented to part with his property only upon certain conditions; and the transfer and conditions must in reason and in justice stand or fall together. If the court upholds the assignment, it must uphold the conditions; 'it cannot substitute its own discretion for that with which the assignor has in express terms invested the assignee.' The only course open to the courts is to pronounce the whole assignment invalid.²

Some discretion however, short of that discretion which proceeds from the authority of the debtor and is independent of the courts, must be allowed to the trustee, if assignments are to be sustained at all. The trustee cannot sell at once; he can only be required to exercise reasonable prudence in the matter. He may take time to advertise, and hence must himself set a day for the sale. And if no bidders should come, it would be lawful for him, and it would be his duty, to set another day. The manner of the sale must also be left to him; he must decide whether to sell the property in parcels

¹ Jessup v. Hulse, *supra*.

² *Ib.* Selden, J.

or entire;¹ and many other similar matters must of necessity be left to his judgment, though he should act as far as possible in consultation with the (assenting) creditors.²

When it comes however to the application of the rule to specific cases other than such as those just mentioned, the courts have encountered some difficulties. What is to be said of a provision giving the assignee discretion in regard to the time of sale generally, or conferring upon him power to sell at such convenient time, or at such time or times, as he may think best? Upon the answer to be given there has been conflict of authority. It has been declared that to give the trustee a discretion to sell at such time as he may think best would be to allow him to delay the sale indefinitely, so long as he might think it expedient to wait for better prices; and that would subvert the assignment.³

On the other hand it has well been declared that fraud ought to be clearly proved, and that a provision, in an assignment for creditors or in any other instrument, which may as reasonably be taken in a sense which would support it as in a sense which would make it fraudulent, should be taken in the first-named sense.⁴ Accordingly it has been held, overruling the decisions and dicta to the contrary, that the conferring of power to sell at such time or times as the trustee may think best is

¹ It is doubtful whether the assignee could determine so important a question as whether to sell by auction or retail; that would be to allow him to determine that the business might be carried on for possibly a great length of time. Such a question should not be taken out of the hands of the court. See *Preston v. Southwick*, 115 N. Y. 139, post, p. 322.

² *Selden, J. in Jessup v. Hulse*, 21 N. Y. 168, 169. See also *Maennel v. Murdock*, 13 Md. 164; *Maughlin v. Tyler*, 47 Md. 545; *Hardin v. Osborne*, 60 Ill. 98.

³ *Selden, J. in Jessup v. Hulse*, 21 N. Y. 168; *Brigham v. Tillinghast*, 13 N. Y. 215, 220.

⁴ *Coke, Litt.* 42; *Crook v. Rindskopf*, 105 N. Y. 475, 485 (reversing 34 Hun, 457); *Townsend v. Sternes*, 32 N. Y. 214; *Benedict v. Huntington*, ib. 219; *Wilson v. Robertson*, 21 N. Y. 587, 589; *Kellogg v. Slauson*, 11 N. Y. 302; *Palmer v. Mason*, 42 Mich. 146 (casting doubt upon *Pierson v. Manning*, 2 Mich. 445); *State Bank v. Chapelle*, 40 Mich. 447; *Watkins v. Wallace*, 19 Mich. 57; *Mattison v. Judd*, 59 Miss. 99; ante, p. 274.

not to be construed as giving to him a discretion emanating from the authority of the debtor and beyond the control of the courts. It is important to illustrate the doctrine.

In a leading case¹ in New York suit had been brought for conversion, the plaintiffs claiming the property under an assignment made to them for creditors, the defendants claiming as creditors under a levy of execution. The defendants' case rested upon the alleged fraudulent intent of the assignment, manifested by a provision that the plaintiffs should take possession of the property assigned, 'and sell and dispose of the same upon such terms and conditions as in their judgment may appear best and most for the interest of the parties concerned.' The court, while re-affirming the rule that a provision authorizing a sale on credit would establish the 'intent' of the statute, held that the clause in question was not to be construed as authorizing a sale in that way.

The 'terms and conditions' were indeed left by the instrument to the discretion of the trustees; but (where the instrument did not show the contrary) that discretion was to be exercised within legal limits; it was a legal discretion.² The law implied a restriction when there were no express words; it would not defeat the assignment by inferring that the debtor contemplated an illegal act. There was no express authority to sell on credit or to do any other illegal act, and there was ample room for the discretion given. The discretion related to the manner of sale;³ a construction which would uphold the instrument was to be preferred to one which would defeat it.⁴

¹ Kellogg v. Slauson, 11 N. Y. 302.

² To the same effect Nye v. Van Huse, 6 Mich. 329; Cribben v. Ellis, 67 Wis. 337, overruling Keep v. Sanderson, 2 Wis. 42; s. c. 12 Wis. 352.

³ Brigham v. Tillinghast, 13 N. Y. 215, 219.

⁴ 'The assignees were at liberty to sell at public or private sale, in large or

small quantities, or one article, with the privilege of taking more of the same kind at the same price. They might require a certain percentage to be paid at the time of the bid and the balance on delivery, and might prescribe the time and place for delivery in gross or in parcels. The language of the assignment can be abundantly

The same view, it was shown, had already been taken by the courts of the same state. In one case¹ the assignment contained a provision in which the same language now under consideration was used; and it had there been held by the Supreme Court that that language did not authorize the trustees to sell on credit. There was another case of the same sort, in which the same conclusion had been reached.² In still another case³ in the Court of Chancery an assignment directed the trustee to sell 'in such manner and at such reasonable times as should seem proper to him;' and this was held not to authorize a sale on credit, and did not invalidate the assignment. It did not sanction the inference of an illegal purpose.⁴

In another case⁵ in the Court of Appeals of New York it appeared that property had been conveyed to an assignee in trust to pay debts, and that he was directed 'forthwith [to] take possession of the said premises and sell the same without delay for the best price that can be procured.' It was objected apparently that this gave to the assignee a discretion not legally incident to his trust, and one not capable of being

satisfied by a construction that shall support the instrument, and in such case the rule is well settled that a construction shall not be given which shall defeat it.' Parker, J.

¹ Whitney v. Krows, 11 Barb. 198.

² Southward v. Sheldon, 7 How. Pr. 414.

³ Meacham v. Sternes, 9 Paige, 398.

⁴ The court did not as yet overrule the cases in the Supreme Court in which provisions for sale 'within such convenient time' as should seem best to the trustees were held fatal. Woodburn v. Mosher, 9 Barb. 255; Murphy v. Bell, 8 How. Pr. 468; Brigham v. Tillinghast, 13 N. Y. 215, 220. But the way was prepared by a distinction.

Far within the rule was a later case

in which objection was made to an assignment on the footing of a provision directing the assignee to convert the property 'into cash as soon as the same may conveniently and properly be done.' It was urged that this gave to the assignee a discretion beyond any allowed by law. But this was denied by the court. The provision was somewhat criticised, but it was not essentially bad. 'An assignment drawn precisely as it ought to be will not undertake to speak to the assignee in regard to his duties under the trust.' But the provision in this case was 'harmless' and 'supererogatory.' Ogden v. Peters, 21 N. Y. 23.

⁵ Griffin v. Marquardt, 21 N. Y. 121.

controlled by the courts on application of creditors. But the court refused to entertain this view. All that the provision meant was that the assignee should proceed to sell without unreasonable delay; it could not be construed into an attempt to exempt the assignee from his legal duties.

In a contemporaneous case¹ before that court creditors sought to invalidate an assignment as void on its face, because of a provision that the assignee should 'sell, dispose of and convey the said real estate and personal property, at such time or times, and in such manner, as shall be most conducive to the interests of the creditors . . . and convert the same into money as soon as may be consistent with the interests of said creditors.' The court again held that the provision gave to the assignee no powers beyond those authorized by law; the assignee was 'virtually directed to perform his duty according to the rules and requirements of the law.' The giving of any discretion 'as coming directly from the assignor himself' would be fatal;² here the assignee was not to exercise any other judgment than that of the court, of which he was to be treated as the agent. Any error of judgment on his part could at once be corrected by an application to court.

In a case³ before the same court a few years later a provision in an assignment was held to fall within the law, which provided that the assignee should have power 'to sell and dispose of the assigned premises, at such time or times, and in such manner, as to him may seem to be most for the benefit and advantage of the creditors.' This was no more than the law itself required; and the validity of the direction had

¹ Jessup v. Hulse, 21 N. Y. 168.

² The example here given by the court — discretion to sell at such time and in such manner as in *the judgment of the trustee* would be most conducive to the interests of the creditors —

would not now hold; the trustee's action would still be within the control of the courts. Townsend v. Sternes, 32 N. Y. 214, *infra*.

³ Townsend v. Sternes, 32 N. Y. 209.

been repeatedly upheld.¹ And a like rule has lately been applied to a case in which the mortgagee of a stock of goods took possession and continued the sale of the property for a short time at retail, instead of disposing of it by auction; this was deemed not necessarily fraudulent.²

None of these cases professed to overrule the decisions (before mentioned) holding fatal provisions for sale 'within such convenient time' as should seem best to the trustee; those decisions were sometimes distinguished.³ At the same term however in which the decision last referred to was rendered a case⁴ came before the Court of Appeals, in which the question was directly faced whether to overrule or to follow the decisions referred to; and they were now expressly overruled. In the case cited an assignee in an assignment for creditors had been authorized to take possession, 'and within such convenient time as to him may seem meet, by public or private sale, for the best price that can be procured, shall convert' the property into money. The court held that this did not show an intent to hinder creditors; the control of the courts was not taken away.⁵

Whatever differences of opinion the authorities may dis-

¹ Kellogg v. Slauson, 11 N. Y. 302; Jessup v. Hulse, 21 N. Y. 168; Wilson v. Robertson, ib. 587. See Doe d. Shackelford v. Bank of Mobile, 22 Ala. 238.

² Preston v. Southwick, 115 N. Y. 139. Secus of course if it was at all for the benefit of the mortgagor. Ib.

³ Kellogg v. Slauson, supra.

⁴ Benedict v. Huntington, 32 N. Y. 219.

⁵ Potter, J.: 'If the rule laid down in those cases is sound, the judgment in this case should be reversed, for the language of the power contained in the assignment in this case is identical with the first of those cases [Woodburn v. Mosher, 9 Barb. 255], and in effect so with the other [Murphy v. Bell, 8

How. Pr. 468]. . . . It is time that this apparent conflict of cases and confusion of rules . . . should be settled. It appears to me that the case of Jessup v. Hulse [supra], divested of the apparent indorsement of the two cases above referred to, controls the case before us. . . . I am of opinion that the construction given to the assignments in the cases of Woodburn v. Mosher and Murphy v. Bell has been overruled in the later cases, and that those cases are not authority.'

The whole line of cases in the Court of Appeals, above presented, was affirmed. Benedict v. Huntington, supra. See also Bellows v. Partridge, 19 Barb. 176.

close in regard to the construction to be placed upon particular words or clauses, the New York courts, with many others following their lead, are agreed in the principle to be applied. The question to be considered in regard to the provision is this: taking the language as it stands, does it clearly exclude the interposition of the courts, in the matter of the discretion, upon the application of the assenting creditors?¹ If it does, then (assuming that creditors' rights have not been abridged by law) the debtor has attempted to take away from his creditors a right, and the assignment is invalid against all who do not assent.² If on the other hand the discretion of the courts is not clearly excluded, it is to be considered that there was no intent to exclude it, and the assignment is good.³ This principle, it is apprehended, is general, and not limited to the class of cases just considered.

There is a very special aspect (already alluded to) of this subject of discretionary powers, which has also been the sub-

¹ This of course assumes that the interposition of the courts would be excluded so long as the trustee conformed to the powers given by the assignment; it has no reference to cases of the right of the courts to interfere against unlawful conduct of the trustee.

That the intent to exclude the courts should be clear is obvious enough; and it is equally obvious that the ordinary provisions show no such intent because they are generally the language of printed documents, drawn up with a view to meet the very requirements of the law.

² *Hardin v. Osborne*, 60 Ill. 93 (trustee to sell 'at most favorable opportunity . . . of which event he is to be the sole judge'). Contra, *Cannon v. Peebles*, 2 Ired. 449; *Hardy v. Skinner*, 9 Ired. 191; *Gilmer v. Earnhardt*, 1 Jones, 559; *Rundlett v. Dole*, 10 N. H. 458; *Bennett v. Union Bank*, 5 Humph. 612.

³ *Hollister v. Loud*, 2 Mich. 309; *Dubose v. Dubose*, 7 Ala. 235, 240 (trustee to sell on request of either of the parties of the third part . . . such part of the trust property as may be necessary to protect them; any execution creditor could compel a sale, so that the trustee was not put beyond the reach of the courts); *Tarver v. Roffe*, ib. 873 (to same effect); *Planters' Bank v. Clarke*, ib. 765 (same); *Evans v. Lamar*, 21 Ala. 333; *Doe d. Shackelford v. Bank of Mobile*, 22 Ala. 238; *Perry Ins. Co. v. Foster*, 58 Ala. 502 (which goes to the verge of the law); *Mussey v. Noyes*, 26 Vt. 462.

It is nothing of course that a proper power may be abused, so long as the right of the courts to interpose is not taken away. See *Montgomery v. Galbraith*, 11 Smedes & M. 555. See *Meeker v. Saunders*, 6 Iowa, 61.

ject of conflict of authority through the country, to wit, provisions giving to the trustee or assignee discretion or power to sell on credit. The New York law, as might well be expected, fully and consistently discountenances such provisions; the courts of that state declaring that they establish the 'intent to hinder, delay, or defraud' of the statute.¹ The control of the courts over the trustee is effectually taken away, and the authority of the debtor substituted for the law, i. e. for the rights of creditors. In the first case cited the court laid it down as understood law that when a person had promised to pay money, the time of payment was of the essence of the contract, and when that time arrived an immediate appropriation of the debtor's property might be compelled. The debtor might turn his property over to a trustee for his creditors with such delay as that might require; but he could not avoid the duty to pay at once; he could not extend the time of credit. An illustration is found in a provision in the assignment that the assignee may convert the property into 'money or available means;' the latter words would authorize a sale on credit, and hence they avoid the whole transaction.²

The New York rule has been followed by many courts,³

¹ Nicholson v. Leavitt, 6 N. Y. 510; Bellows v. Partridge, 19 Barb. 176; Porter v. Williams, 9 N. Y. 142; Kellogg v. Slauson, 11 N. Y. 202; Brigham v. Tillinghast, 13 N. Y. 215; Dunham v. Waterman, 17 N. Y. 9; Nichols v. McEwen, ib. 22; Wilson v. Robertson, 21 N. Y. 587, 589; Benedict v. Huntington, 32 N. Y. 219; Robbins v. Butcher, 104 N. Y. 575. Southworth v. Sheldon, 15 Barb. 56; Moir v. Brown, 14 Barb. 39; Whitney v. Krows, 11 Barb. 198.

This probably would not affect a provision giving the trustee the right to take market securities in payment of property sold, though such securities might still have a long time to run.

Upon the question what language falls within the rule see the foregoing cases; also Clark v. Fuller, 21 Barb. 128;

Under the New York Statute of Uses and Trusts, a statute much copied, and not to be confounded with general statutes against fraudulent conveyances, it is held that power given to a trustee to sell or mortgage land is valid as to the power to sell, though the trust to mortgage is void. Darling v. Rogers, 22 Wend. 483, reversing 7 Paige, 272. See Van Nest v. Yoe, 1 Sandf. Ch. 4, 6.

² Brigham v. Tillinghast, 13 N. Y. 215.

³ Means v. Dowd, 128 U. S. 273,

and rejected by not a few.¹ The ground upon which the rule has been rejected looks plausible at first. It is commonly put in substance thus: Sale by a trustee upon a reasonable time of credit, where the security is good, far from being an act of bad faith, is itself an act of good faith; a rule that the trustee must always sell for cash 'would not be for the interest of creditors.'² The provision thus is supported as being in the interest of the creditors. But the answer is plain enough. The provision is inconsistent with the debtor's contract or duty, and hence is against the right, if not abridged by law, of the creditor to have an immediate recourse to his debtor's property, on non-payment by the debtor; and neither

282; *Kepner v. Burkhart*, 5 Barr, 478; *Henderson v. Downing*, 24 Miss. 106, 116 (extension of time); *Sutton v. Hanford*, 11 Mich. 513; s. c. 14 Mich. 19; *Nye v. Van Huse*, 6 Mich. 329; *Palmer v. Mason*, 42 Mich. 146; *McCleery v. Allen*, 7 Neb. 21; *Cribben v. Ellis*, 69 Wis. 337 (overruling *Keep v. Sanderson*, 2 Wis. 42; s. c. 12 Wis. 352); *Mussey v. Noyes*, 26 Vt. 462, 470; *Paige v. Olcott*, 28 Vt. 465, 468; *Gardner v. Commercial Bank*, 95 Ill. 298, 307; *Pierce v. Brewster*, 32 Ill. 268; *Greenleaf v. Edes*, 2 Minn. 264; *Truitt v. Caldwell*, 3 Minn. 364 (authority to 'dispose of the property in the ordinary course of the business'); *Bennett v. Ellison*, 23 Minn. 242; *Lord v. Devendorf*, 54 Wis. 491; *Hutchinson v. Lord*, 1 Wis. 286; *Beuss v. Shaughnessy*, 2 Utah, 492. See also *Livermore v. McNair*, 34 N. J. Eq. 478; *Johnson v. Thweatt*, 18 Ala. 741, 746, 747; *Keevil v. Donaldson*, 20 Kans. 165. It makes no difference whether the provision appears upon the face of the deed of assignment or is made the subject of special and oral agreement, if contemporaneous. *Bennett v. Ellison*, *supra*; *Whitney v. Kelley*, 67 Maine,

377. *Comp. ante*, pp. 230, 263, 265, 266.

¹ *Neally v. Ambrose*, 21 Pick. 185; *Hoffman v. Mackall*, 5 Ohio St. 124; *Ely v. Hair*, 16 B. Mon. 230; *Elmes v. Sutherland*, 7 Ala. 262; *Abercrombie v. Bradford*, 16 Ala. 560; *Evans v. Lamar*, 21 Ala. 333; *Johnson v. McAllister*, 30 Mo. 327; *Farquharson v. Eichelberger*, 15 Md. 63; *Richardson v. Marqueze*, 59 Miss. 80; *Gunnell v. Adams*, 11 Humph. 85; *Eicks v. Copeland*, 53 Texas, 581. See *Anderson v. Sachs*, 59 Miss. 111. The earlier New York cases were to the same effect. *Burrill, Assignments*, § 221, note. And so are the English. *Janes v. Whitbread*, 11 C. B. 406.

In some states the provision for authority to sell on credit makes the assignment *prima facie* fraudulent. *Billings v. Billings*, 9 Cal. 107, 114; *Baldwin v. Peet*, 22 Texas, 708; *Eicks v. Copeland*, *supra*. See *Raleigh v. Griffith*, 37 Ark. 150.

² *Conkling v. Conrad*, 6 Ohio St. 620; *Abercrombie v. Bradford*, 16 Ala. 560, 565; *Beatty v. Davis*, 9 Gill, 211; *Woodward v. Marshall*, 22 Pick. 468, 474.

the debtor nor the court has any legitimate power to impair that right. It is for the owner of the right to judge of the expediency of accepting something else;¹ and the act of the debtor in executing an assignment with such a provision in it is a plain declaration of his intent to delay his creditors, whatever his motive.² The case is within the very language of the statute against fraudulent conveyances; and nothing has ever been gained by relaxing the laws against fraud.

The rule against attempts of the debtor to allow sales on credit, or in any way to extend the time of payment of the debts,³ is a general one, and has no regard to the nature of the debtor's property. It matters not that the debtor turns over to his assignee choses in action not yet due; he must not authorize his assignee to hold the same until maturity.⁴ The point is well illustrated by a case⁵ in chancery in New

¹ *Van Nest v. Yoe*, 1 Sandf. Ch. 4, 6; *Gardner v. Commercial Bank*, 95 Ill. 298, 305.

² Parol evidence therefore cannot be received to show that the provision was introduced for an honest purpose and that it worked for the advantage of creditors. See the analogous case of *Inloes v. American Bank*, 11 Md. 173, where in reference to a provision authorizing the sale of assigned merchandise 'gradually,' it was said, quoting *Tranmel v. Trieber*, 3 Md. 11, 40: 'There is nothing for the jury to pass upon, when the court can see that the instrument is fraudulent on its face. We are to look to the character with which the law stamps the deed, without reference to extrinsic facts as to motive. . . . If the law declares such deeds to be void, it is no matter how the question of fraud, in fact, may stand.'

So in *Malcolm v. Hodges*, 8 Md. 418, where also it was urged that the provision was for the advantage of the

creditors, it was said: 'We cannot look outside the assignment to ascertain whether there will be a surplus or not. That would make the efficacy of the instrument depend on extrinsic circumstances, when the law requires that its intent shall be gathered from its face [when the intent there is plain. See *Johnson v. Thweatt*, 18 Ala. 741].' Quoted and approved in *Inloes v. American Bank*, *supra*.

See also *Gardner v. Commercial Bank*, 13 R. I. 155, 171, virtually overruling *Nightingale v. Harris*, 6 R. I. 321.

³ *Livermore v. McNair*, 34 N. J. Eq. 378; *Evans v. Lamar*, 21 Ala. 333; *Reynolds v. Welch*, 47 Ala. 200; *Lehman v. Kelly*, 68 Ala. 192; *Clayton v. Johnson*, 36 Ark. 406. But see *Hempstead v. Johnston*, 18 Ark. 123; *Walshall v. Rives*, 34 Ala. 91; *McCleery v. Allen*, 7 Neb. 21.

⁴ *Storm v. Davenport*, 1 Sandf. Ch. 135; *Lehman v. Kelly*, *supra*.

⁵ *Storm v. Davenport*, *supra*.

York. An assignment by an insolvent debtor turned over to the assignee a bond and mortgage; the deed of assignment containing a provision that the bond and mortgage should be held 'until the expiration of the said period of five years therein mentioned, and in no case parted with until the expiration of that period.' At the end of that time, 'and not before,' the assignee should proceed to collect the principal; the bond and mortgage had four years yet to run. It was held that the assignment was fraudulent and void.¹

The New York rule holds good also where the assignment looks to a continuance of the business of the debtor further than is actually necessary in the course of getting in the effects and closing it out.² In the case first cited an assignment

¹ Sandford, V. C. : 'The effects of an insolvent debtor are by law subject to be sold and applied to the payment of his debts as fast as the creditors can recover them by regular process. This rule applies as well to things in action as to goods and lands. And although the law permits the process of a creditor to be interrupted, and even defeated, yet it will not tolerate in such assignment any restriction or limitation upon the immediate sale or conversion of the property for the benefit of the creditors.'

² Dunham v. Waterman, 17 N. Y. 9; Gardner v. Commercial Bank, 95 Ill. 298; Gardner v. Commercial Bank, 13 R. I. 155; First National Bank v. Hughes, 10 Mo. App. 7; De Wolf v. Sprague Manuf. Co. 49 Conn. 282, 326; Stafford Bank v. Sprague, 17 Fed. Rep. 784; Jones v. Syer, 52 Md. 211; Maughlin v. Tyler, 47 Md. 545; American Bank v. Inloes, 7 Md. 380; s. c. 11 Md. 173; Bigelow v. Stringer, 40 Mo. 195; Keevil v. Donaldson, 20 Kans. 165; Price v. Mazange, 31 Ala. 701; Bernard v. Barney Myroleum Co. 147

Mass. 356, 359; Arthur v. Commercial Bank, 9 Smedes & M. 394; Sheerer v. Lautzenheizer, 6 Watts, 543; Peter v. Light, 76 Penn. St. 289, infra; Spencer v. Slater, 4 Q. B. D. 13; Boldero v. London Loan Co. 5 Ex. D. 47, 52.

Further see Woodward v. Marshall, 22 Pick. 468; Foster v. Saco Manuf. Co. 12 Pick. 451; Kendall v. New England Carpet Co. 13 Conn. 383; DeForest v. Bacon, 2 Conn. 633; Shepards v. Turpin, 3 Gratt. 373, 398; Berry v. Riley, 2 Barb. 307; Hitchcock v. Cadmus, ib. 381; Mattison v. Judd, 59 Miss. 99; Anderson v. Sachs, ib. 111; Janes v. Whitbread, 11 C. B. 406; Owen v. Body, 5 Ad. & E. 28; s. c. 6 Nev. & M. 448; Wheatcroft v. Hickman, 9 C. B. n. s. 47, 101. Most of these cases are explained in De Wolf v. Sprague Manuf. Co. supra, as being cases in which the business 'to be carried on was merely ancillary to winding up the debtor's affairs.'

There is probably a distinction between cases of assignments for creditors, with authority in the assignee or trustee to continue the business, and cases of

for creditors of all the property of an insolvent debtor, consisting in part of unfinished machinery and materials in process of manufacture the completion of which was necessary to an advantageous sale, contained a provision authorizing the assignees to complete the manufacture and work up the materials at the expense of the fund assigned, as in their judgment might be advisable, so as to realize the greatest amount of money therefor. This was held to render the assignment fraudulent and invalid on its face, though actual intent to defraud was disproved, on the ground that it authorized delay beyond what was necessarily incident to an assignment.¹

Where however the authority conferred upon the assignee in regard to continuing the business is not an authority within his own independent discretion, the case is different.² In the case cited an assignment for creditors contained the following provision: 'And it is further provided that, should it be

property given in mortgage, pledge, or the like, to a particular creditor to secure him. If the property turned over to the creditor is not equal to, or not in excess of, the debt (and 'excess' would perhaps be rather liberally interpreted), the mortgagee may be allowed to complete unfinished materials, and perhaps to dispose of the property in such way as might seem best to him; as e. g. by gradually winding up the business of making and selling leather. Comp. *Clow v. Woods*, 5 Serg. & R. 275, a very important case, in which a mortgaged tanyard was left in the possession of the mortgagor, with right to finish materials.

Perhaps the same would be true of an assignment to a single creditor, whose claim was obviously greater than the value of the property assigned. In either of these cases the debtor would have the right to make over the property to the creditor in payment; and if

in payment, why not in part payment, according to the amount realized by completing unfinished materials and gradually selling off? 'I can see no objection,' said Gibson, J. in a masterly opinion in *Clow v. Woods*, supra, 'to an absolute sale of an article undergoing a process of manufacture, to be delivered when finished; and if such a sale would be good, a mortgage under the same circumstances would also be good.' That however is dangerously near the prohibitory line; it is safer to treat provisions authorizing a continuance of the business as fraudulent unless it is perfectly clear that they cannot impair, and were not intended to impair, the rights of the other creditors.

¹ *Cunningham v. Freeborn*, 11 Wend. 240, so far was overruled.

² *Robbins v. Butcher*, 104 N. Y. 575. See *Anderson v. Sachs*, 59 Miss. 111.

necessary . . . the party of the second part shall have full power and authority to finish such work as is unfinished, to complete such buildings as are incomplete, and to pay all necessary charges and expenses for such completion prior to the payment of all debts and liabilities hereinbefore mentioned.'¹ The court held that the authority given was not one in the arbitrary discretion of the assignee, but that it was conditional upon circumstances which the courts must consider. It was not an authority to continue the business as the assignee might think it necessary to do so, but as might actually '*be necessary*;' and that looked to the control of the courts.²

Again it may be that in an assignment of the kind it is provided or contemplated that others may embark their capital or materials; and in that case, if the provision is acted upon by a stranger to the debtor, he will be entitled to maintain his title to what he has contributed or produced in so far as it is clearly distinguishable from the property of the debtor. That is to say, the assignment may be allowed to stand so far as to protect his severable interest. In a Penn-

¹ See *Woodward v. Marshall*, 22 Pick. 468.

² Finch, J.: 'Two cases in this court have drawn a line of distinction between the constructions which have been argued. In one of them (*Dunham v. Waterman*, 17 N. Y. 9) the assignment gave authority to the assignees to pay such sums "as they may find expedient" in completing unfinished articles, as "in their judgment shall seem most advisable." The assignment was held to be void. The whole point of the decision was that the instrument conferred a discretion upon the assignees which superseded the authority of the courts. . . . The instrument before us does not thus offend, as we

read its terms. The authority given is not absolute but conditional, and the condition presumes the full control and supervision of the courts. . . . The words are "should it *be necessary*." . . . Who is to judge of that necessity or prudence? . . . It must *be necessary*. It is not enough that the assignee thinks so. . . . It comes within the doctrine of the later authority, *Jessup v. Hulsa*, 21 N. Y. 168, 170. . . . The court asked who was to judge as to whom or how the sale would be most beneficial, and answered, not the assignee, for no power to determine was vested in him. It remained in the courts. . . . That is true, as we read it, of the instrument before us.'

sylvania case¹ an insolvent debtor assigned ironworks to L, for creditors, L to carry on the business so long as the creditors might deem it for their benefit, and, when the creditors so determined, to sell the property and distribute the proceeds. L took the property accordingly, and manufactured a large quantity of iron from money furnished by himself. It was held that, though the assignment was invalid towards non-assenting creditors, the iron made by L could not be taken.

The doctrine under consideration applies in principle, where creditors' rights are complete, to cases in which an authority is given to the trustee to mortgage the property, or any part of it; for this again takes away the authority of the courts to interpose, at the request of creditors, and compel the trustee to proceed to the settlement of the trust.² Some of the courts however, overlooking the principle that it is not for the debtor to say what is for the interests of creditors, and that it is not for the courts themselves to say that provisions which impair the rights of creditors are on the whole for their benefit, have refused to disturb assignments authorizing the trustee to mortgage or pledge.³

An obvious case in which the debtor assumes to take away from the courts the authority to control the trust is where he

¹ *Peter v. Light*, 76 Penn. St. 289.

² *Gardner v. Commercial Bank*, 95 Ill. 298, 307; *Plauck v. Schermerhorn*, 3 Barb. Ch. 644, 646. The learned Chancellor here only says that 'the power in this assignment to lease or mortgage' was void; but the case appears to have arisen under the Statute of Uses and Trusts. See ante, p. 180, note; *Waldron v. Wilcox*, 13 R. I. 518, 521. See also *Gardner v. Commercial Bank*, 13 R. I. 155.

³ *Beatty v. Davis*, 9 Gill, 211; *Waldron v. Wilcox*, supra; *Montgomery v.*

Galbraith, 11 Smedes & M. 555. It is conceded that a power could not be reserved to the *debtor* to mortgage. *Beatty v. Davis*, supra. If one reason of this is that the debtor cannot reserve a benefit to himself out of the property, another equally good reason is that he has no power over the creditors' rights; and if he has no power which he can exercise for himself, he has none which he can confer upon another. *Grover v. Wakeman*, 11 Wend. 187, 203, infra, p. 314, note.

puts into the assignment a provision by which he reserves to himself the power to revoke the instrument, even indirectly, as e. g. by a power of appointment. From the time at least of Sir Edward Coke such a provision has been held to invalidate the instrument on the ground of fraud.¹ It is said however that where the power of revocation is not absolute, but clogged with a condition which is not illusory, the deed would not seem to be more within the reason than within the words of the statute of Elizabeth;² assuming that the act cannot be turned to the advantage of the assignor.³ But even with this last qualification the suggestion is one to be regarded with distrust, because, as we shall now see, the provisions of the assignment should be definitely fixed by the instrument itself.

¹ *Twyne's Case*, 3 Coke, 80; *Tarback v. Marbury*, 2 Vern. 510; *Doe d. Willis v. Martin*, 4 T. R. 39; *Riggs v. Murray*, 2 Johns. Ch. 565; s. c. 15 Johns. 571; *Cannon v. Peebles*, 4 Ired. 204; *West v. Snodgrass*, 17 Ala. 549; *Benedict v. Renfro*, 75 Ala. 121; *Jenkyn v. Vaughan*, 8 Drew. 419, 427; *Smith v. Hurst*, 10 Hare, 30; *Acraman v. Corbitt*, 1 J. & H. 410. And comp. 27 Eliz. c. 4, § 5. Provisions concerning powers of revocation touching subsequent purchasers are common in our statutes against fraudulent conveyances. These provisions are all founded upon the 27th Eliz.

² *Cannon v. Peebles*, supra, referring to *Doe d. Willis v. Martin*, supra.

³ *Ib.* Some of the very early cases appear indeed to have made a distinction between general powers of revocation or powers to be exercised by the debtor with consent of some relative or person under the debtor's control, and powers to be exercised only with the consent of some independent person, as e. g. the trustee; the latter being allowed. *Banbury's Case*, 1 Freem. 8

(1676); *Hungerford v. Earle*, 2 Freem. 120; s. c. 2 Vern. 261 (1692). But it is not probable that these cases would now be followed in this country, even if they would be followed in England. Clearly they are contrary to the spirit of the New York authorities. The only stranger to the transaction who can be depended upon as beyond the influence of the debtor is a judicial tribunal. Nor can it make any difference that the person whose consent is to be obtained has not been designated by the debtor.

For other early cases concerning the reservation of powers of revocation see *Moore*, 608, pl. 842 (19 Eliz.); *Bullock v. Thorne*, ib. 615 (42 Eliz.); *Sheldon v. Handbury*, ib. 757 (2 Jac. I.); *May*, *Fraud. Conv.* 111, 2d ed. citing *Holcroft's Case*, *Dyer*, 203; *Garth v. Ersfield*, *Bridgm.* 22; *Rex v. Nottingham*, *Lane*, 42; *Bethel v. Stanhope*, 2 Croke, *Eliz.* 810.

As to powers of revocation inter partes the case is of course different; e. g. in voluntary settlements. See *May*, *Fraud. Conv.* 481, 482; 2d ed.

A special case falling within the rule of the last paragraph, a case in which the authority and operation of the law is taken away, and with it of course the right of the creditors to call upon the courts to direct the trustee, is where the debtor reserves to himself, in the deed of assignment, or in some contemporaneous arrangement to be taken as part of it, a power to change any of the dispositions, or where he gives to the assignee or trustee such a power.¹ It is laid down in New York for established law that a debtor cannot put his property beyond the reach of his creditors, by assigning it to trustees for the payment of his debts, unless at the same time he settles definitely the dispositions to be made.²

In the case first cited, which was replevin by assignees for merchandise levied upon by a deputy sheriff on behalf of creditors, it appeared that the assignment contained the following provision: 'sixth, to pay and discharge all the debts and liabilities contracted by the firm of C. E. Morris & Co., and if any of the said last-mentioned debts or liabilities become pressing, and the said Dodge shall as surety or individually become responsible, then in that case the said debts so assumed by said Dodge are to be preferred among the said partnership debts.' This was held to establish an intent to defraud, in the assignment. In one³ of the other cases cited, a bill to set aside an assignment as a fraud upon creditors, it appeared that preferences had been given to three classes of the creditors before the general creditors were reached; and there followed a provision authorizing the trustees, in their

¹ See *West v. Snodgrass*, 17 Ala. 549.

² *Sheldon v. Dodge*, 4 Denio, 217, *Jewett, J.*; *Hyslop v. Clarke*, 14 Johns. 458; *Wakeman v. Grover*, 4 Paige, 41; *n. c. in error*, 11 Wend. 187; *Barnum v. Hempstead*, 7 Paige, 568; *Brown v. Guthrie*, 39 Hun, 29. See also *Spence v. Bagwell*, 6 Gratt. 444; *Sheppards v. Turpin*, 3 Gratt. 373, 398; *Hart v.*

McFarland, 13 Penn. St. 182; *Mitchell v. Stiles*, ib. 306, 309; *Phelps v. Curta*, 80 Ill. 109; *Clark v. Robbins*, 8 Kana. 574; *Cannon v. Peebles*, 2 Ired. 449. But see the suggestion in the last paragraph; and see *Hall v. Wheeler*, 13 Ind. 371; *Wright v. Thomas*, 1 Fed. Rep. 716 (Ind.).

³ *Barnum v. Hempstead*, *supra*.

discretion, to pay all small debts due or to become due to persons at a certain place, to an amount not exceeding \$500, in preference to any of the creditors referred to in the classes before mentioned. The bill was sustained. The discretion given had assumed to take away the authority of the courts over the trustees, and so to give to them the keeping of the rights of the creditors.¹

A like case would be made by a provision in an assignment for creditors, reserving a right to the assignor, or giving the right to the assignee or to any one else, of setting up new

¹ 'So long,' said the court, 'as debtors are permitted to make assignments . . . without consulting their creditors on the subject, it is absolutely necessary for the protection of the rights of the latter that the equitable interests in the assigned property should be fixed and determined by the assignment itself. Neither the debtor, nor his friendly assignees, who are generally selected by himself, should have the power of giving preferences afterwards to any class of debts or creditors.' Quoted and adopted in *Sheldon v. Dodge*, 4 Denio, 217. To the same effect, *Boardman v. Halliday*, 10 Paige, 223. Of course if the debtor cannot himself reserve the power to do such things, he cannot give such power to another. *Ib.* ; *Wakeman v. Grover*, 11 Wend. 187, 203.

The contrary has been held in North Carolina. *Cannon v. Peebles*, 4 Ired. 204, where the debtor reserved in the assignment the right to add to the list of preferred creditors other creditors of the time of the execution of the deed. Ruffin, C. J. said, at p. 211 : 'In terms it is not a provision, or a power to make a provision, for himself or any volunteer under him, but for a directly opposite end. In any event all the property is gone from him forever. But in

parting from it he reserves the power of doing equal justice to all his sureties, as well those he could not then enumerate as those he had specified. If that was really the purpose, it was one of the soundest morality. . . . It is not a power by which apparently he can take benefit indirectly ; for he cannot gain credit and contract new debts on the faith of the power, since it is expressly restricted to those existing at the execution of the deed.' The case was to be left to the jury on the question of fraudulent intent.

The answer to this is in the text. Assignments with preferences are not favored, they are only tolerated. *Mead v. Phillips*, 1 Sandf. Ch. 83 ; *Brigham v. Tillinghast*, 15 Barb. 618 ; *Grover v. Wakeman*, 11 Wend. 157. And they are to be tolerated, against those who refuse to accept them, only upon the footing that their terms, being in themselves proper as far as may be, are entirely fixed in the outset. *Sheldon v. Dodge*, supra. It was admitted in *Cannon v. Peebles* that if the provision in question could in any way work to the advantage of the debtor, the fraudulent intent was established. Such a case, under a similar provision in regard to further preferences, was *Gazzam v. Poyntz*, 6 Ala. 374.

preferences. It would be a mistake to suppose that because the assignor might make present preferences, he could also provide for making preferences after the assignment has gone into effect, as e. g. by providing that this may be done upon the contingency of some act by a creditor beneficial to the assignor. Such a power, it has well been said, would nullify the statute; it would leave the debtor at liberty to lock up his property until his creditors should be forced to accept the terms he chose to dictate.¹ But it is held that there may be a valid agreement, in the sale of goods on credit, to give the seller a preference if it should become necessary by the purchaser's subsequent insolvency.²

Another provision obnoxious to the same principle, unless the rights of creditors have already been cut down by the law, is the provision often found in assignments, by which the assignee is authorized to compound with the creditors; the objection is that it leaves the matter ever open to new preferences, so that no creditor may know whether the

¹ Mr. Senator Tracy in *Grover v. Wakeman*, 11 Wend. 187, 221, a great case. See pp. 316, 317.

It has been maintained that in the case of assignments with preference of creditors the fact that there is fraud upon one class will not enable creditors not of that class, and not affected by the fraud, to avail themselves of it. That is, the fraud does not make the whole assignment invalid. *Powers v. Graydon*, 10 Bosw. 630, 645, *Robertson, J.* But in such a case the creditors of the particular class could, it seems, have the whole assignment annulled, upon the ground that its terms were not definitely, or at least legally, settled from the beginning.

* 'Such a promise,' said Earl, J. in *National Park Bank v. Whitmore*, 104 N. Y. 297, 303, 'honest in fact, has never been held to be a fraud or to

work a fraud upon creditors. Security honestly given in pursuance of such a promise relates back to the date of the promise, and, except as to intervening rights, is just as good and effectual as if given at the date of the promise.' It was deemed to make no difference that the promise was conditional, denying *Smith v. Croft*, 11 Biss. 340, and following s. c. on rehearing, 17 Fed. Rep. 705. Whether a conditional promise of a future preference would be valid in an assignment for creditors however is a different question. Assignments, especially with preferences, are not favored (*Mr. Senator Tracy in Grover v. Wakeman*, 11 Wend. 187, 218); and when, added to this, there is a provision which leaves the transaction open, the assignment cannot in principle or on authority stand.

terms of the assignment are to be carried out. No creditor could know whether he was to stand upon a common footing with the rest or with those of his class. At all events such a provision may take a very objectionable form, and establish an intent to defraud.¹

In a case² in the Court of Chancery of New York a provision in a preferential assignment for creditors authorized the assignees to compound with all or any of the creditors, in such manner and upon such terms as they might deem proper, provided it did not interfere with the order of preferences. This order of preference was distinctly laid down, the creditors being divided into three classes, payment to begin with the first class and then to proceed as the funds held out. The Chancellor decided that this rendered the assignment void on its face; it had given to the assignees power to pay any one of any of the classes a gross sum in lieu of his debt, whether such sum were more or less than what he would be entitled to receive under the terms of the assignment. The effect was to perpetuate the power of giving preferences.³

This case was now taken to the Court of Errors,⁴ where the

¹ *Wakeman v. Grover*, 4 Paige, 23; 11 Wend. 187; *Hudson v. Maze*, 8 Scam. 578; *Keevil v. Donaldson*, 20 Kana. 165. But see *England v. Reynolds*, 38 Ala. 370; *White v. Monsarrat*, 18 B. Mon. 809, 815; *Anderson v. Sachs*, 59 Miss. 111, citing *Price v. De Ford*, 18 Md. 489, *Carlton v. Baldwin*, 22 Texas, 724, and *Watkins v. Wallace*, 19 Mich. 57.

² *Wakeman v. Grover*, 4 Paige, 23.

³ *Walworth*, Ch. at p. 41: 'The effect of this provision therefore is to perpetuate the right of giving preferences, by vesting in the assignees an arbitrary power in relation to these several classes of creditors, and of compounding with any one upon such terms

as they may think proper. If all the creditors of the second class should come in and consent to the terms of the assignment, the assignees are at liberty to pay any one of them a gross sum in lieu of his share of the fund, in advance, although it may be either more or less than he might be entitled to on a final settlement of the trust. And those who might not be willing to come in and discharge the debtors on any other terms, may be induced to accede to the assignment under a promise of a liberal compromise.' And it made no difference that the particular assignees were men of repute, who were not likely to do wrong.

⁴ 11 Wend. 187.

question before the Chancellor was passed by, and his decision affirmed upon other matters in controversy. But in one of the ablest of the several opinions now delivered the view of the chancellor was directly affirmed, and upon the principle now under consideration. 'It has repeatedly been decided,' said Mr. Justice Sutherland,¹ 'that an assignment which does not declare the uses, but reserves to the assignor the power of subsequently doing it, is fraudulent and void; and if the assignor cannot reserve the power of giving preference to himself, he certainly cannot legally confer it upon his assignee.' And this view has recently prevailed in the Court of Appeals, in a decision expressly affirming the foregoing case.² Nor can that be done by contemporaneous agreement out of the deed which could not be done in the deed.³

It must however be clear that the power given is to compromise and compound, that is, to take part *for* the whole; it is no ground for objecting to an assignment that it contains a provision giving authority to the assignee to collect part of the whole, if he is not allowed to give a discharge thereupon. Thus in the case just cited⁴ the assignment contained a provision authorizing the assignee to collect the notes, accounts, and choses in action and take 'part of the whole' when he should deem it expedient. But this was held to mean no more than that the assignee might receive payment by instalments, from time to time; it did not authorize him to give a discharge of the whole on receiving part.⁵

¹ 11 Wend. at p. 203.

² *McConnell v. Sherwood*, 84 N. Y. 522, 528.

³ *Haydock v. Coope*, 53 N. Y. 68, explaining *Spaulding v. Strang*, 37 N. Y. 135, and 38 N. Y. 9.

⁴ *McConnell v. Sherwood*, *supra*.

⁵ In the case of *Coyne v. Weaver*, 84 N. Y. 386, decided at the same term, and referred to in *McConnell v.*

Sherwood, the court may at first appear to have relaxed the rule slightly; but in reality that was a case of construction, and does not affect the integrity of the rule itself. It was there declared, in accordance with authorities already stated, that the court ought not to find fraud unless the case is clear, and that of two constructions one of which would defeat while the other would save the

The objection to provisions authorizing the assignee to compound with the assignor's creditors does not apply with the same force to cases in which he is authorized to compound with the assignor's debtors,—at all events where he is authorized to compound or compromise bad or doubtful debts. It would be too much to require the assignee to bring suit in cases in which there was no reasonable hope of obtaining anything; and accordingly such provisions are held to be unobjectionable.¹ The case might be different if authority were given to compromise any and all claims due the assignor;² though the construction to be given to such a provision would probably be, that only such claims were intended as the assignee might lawfully compromise, to wit, bad or doubtful claims.

The general principle under consideration applies, where creditors' rights are complete, to cases in which the debtor reserves the right to name a successor of the trustee, in case the trustee designated by the assignment should decline the trust or, after entering upon it, should resign his office. This might deprive the courts of the power to remove the trustee and appoint another in his place; should the creditors

instrument, the latter should prevail. Accordingly a provision authorizing the assignee to collect choses in action 'with the right to compound' for the same, 'taking a part for the whole, when he shall deem it expedient' was upheld. 'Those qualifying words,' said the court of the words 'when he shall deem it expedient,' 'may mean either that the assignee is at liberty to compromise any claim if he shall choose to do so, and behind his judgment nobody shall go, or that the assignee may compromise such claims as in the exercise of a sound discretion the interests of the trust require. We think the latter is the plain and proper construction.' That is to say, the discretion given was

within the control of the courts, and therefore did not affect the rights of creditors. 'It confers upon the assignee no unlawful or arbitrary power, and takes away from the creditors no just protection.' Finch, J. at pp. 390, 391. See *Ginther v. Richmond*, 18 Hun, 234; *Bagley v. Bowe*, 105 N. Y. 177.

¹ *Watkins v. Wallace*, 19 Mich. 57; *Dow v. Platner*, 16 N. Y. 562 (Selden and Strong, JJ. dia.); *Brigham v. Tillinghast*, 15 Barb. 618; *Bellows v. Partridge*, 19 Barb. 176; *White v. Monsarrat*, 18 B. Mon. 809; *Price v. De Ford*, 18 Md. 489.

² See *Brigham v. Tillinghast*, 15 Barb. 618, 621.

ask a court for the removal of the trustee, the trustee, rather than be removed, might well consent to give up his trust in favor of some one named by the debtor.¹ In such a case the terms of the trust are not fixed by the assignment. But some courts hold that the provision, instead of invalidating the assignment, would only be inoperative.²

Again the debtor cannot impose the condition upon his trustee of paying, out of the fund assigned, the costs or expenses incurred by the *debtor* in defending suits touching the assignment; a provision to that effect would show that the assignment was made with intent to defraud.³ In the case first cited an assignment contained a provision that the assignees should retain out of the proceeds of the assignment 'all costs and expenses necessarily incurred by *me* or my assignees . . . in defending any suits that may hereafter be instituted against *me* or them . . . by any creditor or other person or persons for any matter or thing growing out of or in any way connected with this assignment.' Beyond the rule that the debtor could not reserve to himself any benefit or advantage out of the assigned property, the natural effect of this provision would be to cause a postponement of distribution for an indefinite period.⁴ A provision too that the debtor should be employed at a certain salary has been deemed to be *evidence*

¹ *Planck v. Schermerhorn*, 3 Barb. Ch. 644, 646, apparently under the Statute of Uses and Trusts. See *Riggs v. Murray*, 2 Johns. Ch. 565.

² *Vansands v. Miller*, 24 Conn. 180.

³ *Mead v. Phillips*, 1 Sandf. Ch. 83. See *Planck v. Schermerhorn*, 3 Barb. Ch. 644; *Mattison v. Judd*, 59 Miss. 99; *Smyth v. Ripley*, 33 Conn. 306.

⁴ The learned Vice-Chancellor said: 'The assignees could not reasonably conjecture, after one sound suit was commenced for "any matter or thing growing out of or in any manner connected with the assignment," what amount of expenses would be incurred

by Phillips in the course of the litigation; and to avoid responsibility, they would defer the close of their trust until all these things should be ascertained. In the mean time creditors, sick with hope deferred, would be ready to accept almost any percentage on their debts and release the residue. . . . It is no answer that the power is contingent, and that no occasion has arisen for its operation. The same was said of the coercive clause in *Wakeman v. Grover*, 4 Paige, 23, and 11 Wend. 187. The question is, What does it enable the debtor to accomplish?'

Mere giving authority to the assignee

of a fraudulent intent;¹ but that could not be true if the sum to be paid was reasonable.²

An intent to defraud, again, is established by a provision in an assignment by a partnership appropriating partnership property to the payment of the private debt, of one of the partners.³ The converse of this appears not to be true, a partner being allowed, in New York at all events, to prefer his copartner, by paying him out of his individual property;⁴ clearly if the individual creditors do not object to the partner's turning in his individual property, in the partnership assignment, it is not for others to object.⁵ It would, it is held, invalidate an assignment by a partnership, to prefer a silent member of the partnership.⁶ So also an assignment by a partnership, which contains a provision preferring debts due to members of the firm, is generally treated as fraudulent,⁷

to defend suits is of course nothing. *Van Nest v. Yoe*, 1 Sandf. Ch. 4, 6.

'As to charges, commissions, and expenses of converting goods into cash, under an illegal assignment, the assignee will not be allowed for any services or disbursements except such as were necessary for the preservation of the property; and these will not include premiums paid for insurance.' *Hunt v. Werner*, 39 Ark. 70.

¹ *Eigenbrun v. Smith*, 98 N. Car. 207; *Frank v. Robinson*, 96 N. Car. 28.

² *Smith v. Craft*, 128 U. S. 436; *Wilcoxon v. Annesley*, 23 Ind. 285. That would not be benefit out of the property.

³ *Haynes v. Brooks*, 115 N. Y. 487; *Wilson v. Robertson*, 21 N. Y. 587; *National Bank v. Cohn*, 42 Hun, 381; *Friend v. Michaelis*, 15 Abb. N. C. 354, declaring immaterial the motive; *Gable v. Williams*, 59 Md. 46; *Pritchett v. Pollock*, 82 Ala. 169; *Patterson v. Seaton*, 70 Iowa, 689. See also *Hartley v. White*, 94 Penn. St. 31, sale of partnership property to pay

private debt. And comp. *De Wolf v. Sprague Manuf. Co.* 49 Conn. 282; *Caulfield v. Curry*, 63 Mich. 594; *Arnold v. Hagerman*, 45 N. J. Eq. 186.

⁴ *Crook v. Rindskopf*, 105 N. Y. 476, 482, citing *Hazard v. Dimon*, 32 N. Y. 65; *Saunders v. Reilly*, 105 N. Y. 12; *Royer Wheel Co. v. Fielding*, 101 N. Y. 504; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46. It certainly is otherwise if there is a provision for return of surplus, without providing for all the debts, individual and partnership. *Collomb v. Caldwell*, 16 N. Y. 484. It was left undecided in *Crook v. Rindskopf*, supra (at p. 481) whether 'intended fraud by one member of a firm, in transferring his individual assets, avoids an assignment of the firm assets made by the firm.'

⁵ *Royer Wheel Co. v. Fielding*, 101 N. Y. 504, 510.

⁶ *Innes v. Lansing*, 7 Paige, 583; *Whitcomb v. Fowle*, 10 Daly, 23.

⁷ *First National Bank v. Wood*, 45 Hun, 411; *Kayser v. Heavenrich*, 5

certainly if any of the assignors derive a benefit from it;¹ it matters not what the personal motive may have been.² That however appears to stand upon the ground of benefit to the debtor, the subject of the preceding chapter.³

Still another way, under the law of New York, of establishing the intent of the statute is to put into the assignment a provision allowing to the assignees or trustees a larger compensation than is allowed by law to persons in similar positions, as e. g. executors or administrators;⁴ and a like case is presented when a lawyer is made the assignee, with a provision allowing him reasonable counsel fees above the expenses and commissions for executing the trust.⁵ An insolvent debtor not in insolvency may select his own assignee and give effect to his own preferences; beyond that he cannot go. He cannot provide for charges not actually necessary for carrying out the assignment; to make the attempt in the assignment is to avoid the instrument.⁶ But the amount to be allowed for compensation will vary according to

Kans. 324. But see *Fanshawe v. Lane*, 16 Abb. Pr. 71.

¹ *Welsch v. Britton*, 55 Texas, 118.

² *First National Bank v. Wood*, *supra*.

³ A partnership assignment of all the property of the members is not fraudulent as to creditors who did not know of the partnership. *Stevenson v. Porter*, 73 Wis. 70.

⁴ *Barney v. Griffin*, 2 Comst. 365. See *Meacham v. Sternes*, 9 Paige, 398; *Arthur v. Commercial Bank*, 9 Smedes & M. 394; *Mattison v. Judd*, 59 Miss. 99.

In Maryland, under the Insolvent Act, 1884, c. 295, against preferences, a reasonable fee could not be reserved to the draughtsman of a deed of assignment for his services. *Wolfsheimer v. Rivinus*, 64 Md. 230, two judges dissenting.

⁵ *Nichols v. McEwen*, 17 N. Y. 22; *Heacock v. Durand*, 42 Ill. 230. See *Thompson v. Childress*, 1 Tenn. Ch. 369; *Wolfsheimer v. Rivinus*, 64 Md. 230. But the mere allowance of attorney fees is not objectionable. *Wooldidge v. Irving*, 23 Fed. Rep. 676; *Butt v. Peck*, 1 Daly, 83; *Armitage v. Rector*, 62 Mo. 600; *Mattison v. Judd*, 59 Miss. 99. See further *Blow v. Gage*, 44 Ill. 208; *Jacobs v. Remsen*, 36 N. Y. 668; *Iselin v. Dalrymple*, 2 Robt. (N. Y.) 142.

⁶ *Roosevelt, J.*: 'To permit him not only to choose his own assignee, but to choose a favorite counsellor at law for the office, and on that ground to charge the already deficient fund with a counsel fee in addition to the regular commission would be establishing a practice pregnant in many cases with the most mischievous consequences.' 17 N. Y. 24.

the nature of the business; and the compensation allowed by law to persons in other positions may not afford any test.¹

A provision sometimes put into assignments, giving the trustee the right to sell at 'public or private sale' according to his best judgment, has given rise to some doubt; and the doubt has in one state at least been turned into legislation against the validity of any such provision.² The sale must in that state be public; whether authority to sell at private sale would show a fraudulent intent, or would only be unlawful, is not clear.³ But the current of authority is in favor of treating the use of language of the kind as not significant of any intent to hinder or defraud.⁴ This view appears to have been taken as a matter of course in New York.⁵ That however does not mean that sales of merchandise at retail or 'gradually' may be authorized, for that would be to authorize a continuance of the business beyond the time necessary for closing the trust;⁶ unless perhaps the language did not exclude the interposition of the courts to direct a sale or sales according to law. Nor does the rule allowing provisions for private sale authorize the trustee to turn parts of the property over to agents to sell on commission.⁷

A short category of special provisions, or acts done or au-

¹ See *Arthur v. Commercial Bank*, 9 Smedes & M. 394.

² *Raleigh v. Griffith*, 37 Ark. 150.

³ The statute was passed 'as a matter of public policy.' *Raleigh v. Griffith*, *supra*, at p. 153.

⁴ *Brigham v. Tillinghast*, 13 N. Y. 215, 219; *Hart v. Crane*, 7 Paige, 37; *Shackelford v. Bank of Mobile*, 22 Ala. 238; *Kyle v. Harveys*, 25 W. Va. 716; *Burgin v. Burgin*, 1 Ired. 453; *Farquharson v. Eichelberger*, 15 Md. 63; *Waldron v. Wilcox*, 13 R. I. 518; *Anderson v. Sachs*, 59 Miss. 111.

⁵ *Brigham v. Tillinghast*, *supra*;

ante, p. 300, note; *England v. Reynolds*, 38 Ala. 370. See also *Preston v. Southwick*, 115 N. Y. 139; *ante*, p. 299, note 1.

⁶ *American Bank v. Inloes*, 7 Md. 380 ('gradually, in the manner, and on the terms in which, in the course of their business, the grantors had sold and disposed of their merchandise'); s. c. 11 Md. 173; *Maughlin v. Tyler*, 47 Md. 545. But see *Anderson v. Sachs*, 59 Miss. 111. See *Meacham v. Sternes*, 9 Paige, 398, 406 (at retail!).

⁷ *Meacham v. Sternes*, *supra*.

thorized, by the assignment, which have the effect to establish the intent to defraud, may be given in conclusion of this particular investigation. The following are of the kind referred to: Naming as assignee or trustee a person whom the debtor knew to be insolvent,—this by the better opinion.¹ Preferring persons who are not creditors.² Exempting the assignee from all liability except for wanton neglect and waste,³ or from all liability except for gross negligence or wilful misconduct,⁴ or from all liability while acting in good faith,⁵ or for property which does not come to his hands, without regard to his duty to be diligent,⁶ or for the expenses or losses arising from carrying out the trust.⁷ Again to include in a deed of trust for a particular creditor, intentionally, a much larger sum than is due may also avoid the instrument.⁸

The debtor may include in his list of preferential creditors persons whose claims are, by reason of some mere technical rule or rule of policy, not enforceable by law, provided they are still just claims. Just as 'one may forego the benefit, when sued, of a defence of the Statute of Frauds (by some authorities), or of the Statute of Limitations, or of usury,'⁹ so

¹ *Reed v. Emery*, 8 Paige, 417; *Haggerty v. Pittman*, 1 Paige, 298; *Browning v. Hart*, 6 Barb. 91; *Connah v. Sedgwick*, 1 Barb. 210. But see *Jennings v. Prentice*, 39 Mich. 421; *Angell v. Rosenbury*, 12 Mich. 241; *Shryock v. Waggoner*, 28 Penn. St. 430. See *Hempstead v. Johnston*, 18 Ark. 123. But see *Cohn v. Ward*, 32 W. Va. 34, where it is held that a receiver should be appointed, the trust otherwise to stand.

The selection of a near relative or of a member of the debtor's family might be objectionable, but could not alone establish fraud. *Shultz v. Hoagland*, 85 N. Y. 464; *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Baldwin v. Buckland*, 11 Mich. 389; *Bompas v. Dotson*, 7

Humph. 310; *Montgomery v. Kirksey*, 26 Ala. 172. Comp. ante, p. 321, n. 6.

² *Frazier v. Truax*, 27 Hun, 587.

³ *August v. Seeskind*, 6 Coldw. 166.

⁴ *Litchfield v. White*, 7 N. Y. 438; *De Wolf v. Sprague Manuf. Co.* 49 Conn. 282.

⁵ *Hutchinson v. Lord*, 1 Wis. 286.

⁶ *Finlay v. Dickerson*, 29 Ill. 9; *True v. Congdon*, 44 N. H. 48. See *Thomas v. Clark*, 65 Maine, 296.

⁷ *De Wolf v. Sprague Manuf. Co.* 49 Conn. 282, 328.

⁸ *Pennington v. Woodall*, 17 Ala. 685; *Stratton v. Putney*, 63 N. H. 577. Further see chapter 19, § 2.

⁹ Ante, p. 50. See *Pennington v. Woodall*, 17 Ala. 685. But see pp. 133-135.

may one recognize the validity of the just claims of creditors, which are thus barred.¹ To refuse the defence, instead of being even evidence of an intent to defraud, is rather, it has well been said, evidence of a determination not to defraud one creditor for the benefit of another.² Possibly it may be proper in a particular case to allow interest not collectible by law; but this, if allowable at all, can be allowed only when it would be equitable and just.³ And so it may sometimes be proper to allow a creditor a higher rate of interest than that collectible by law.⁴ But that is dangerous ground, and the allowance should be examined with jealous scrutiny.⁵

Whether *omissions* on the face of the assignment of what might reasonably be expected there can be treated as invalidating the assignment for fraud is not clear; though there is no doubt that fraud in general, of any sort, may be established by omission as well as by act. But speaking only of assignments for creditors, the instrument might indeed be so wanting as to be inoperative; though that is not saying that the omissions would constitute or even be necessary evidence of fraud.⁶ The case which commonly arises is the omission of schedules and adequate descriptions; that in itself, it is clear, can seldom if ever *establish* fraud in the assignment,⁷ though it may be evidence thereof. Thus it is laid down that to omit to specify the property assigned will not render the assignment fraudulent on its face, but it is a circumstance to be taken into account by the jury.⁸ But of course it may be

¹ *Murray v. Judson*, 9 N. Y. 73, usurious demand.

² *Ib.* Gardiner, J. Comp. however *Planck v. Schermerhorn*, 3 Barb. Ch. 644.

³ *Spencer v. Ayrault*, 10 N. Y. 202. See *Pennington v. Woodall*, 17 Ala. 685; ante, p. 129.

⁴ *Wheelock v. Wood*, 98 Penn. St. 298.

⁵ See ante, p. 129, where cases are given which show that this is doubtful ground.

⁶ See however *Overton v. Holinshade*, 5 Heisk. 683.

⁷ *Cook v. Chamberlain*, 39 Mich. 565.

⁸ *Brown v. Lyon*, 17 Ala. 659; *Robinson v. Rapelye*, 2 Stewt. (Ala.) 86; *Wilt v. Franklin*, 1 Binn. 502; *Shultz v. Hoagland*, 85 N. Y. 469; *Henry v. Root*, 38 Mich. 371; *Cook v. Chamberlain*, supra; *Lang v. Lee*, 3 Rand. 423. See also *England v. Reynolds*, 38 Ala. 370.

shown that the omission was intentional, and so with intent to defraud; and it would probably be necessary to explain any serious omission, to prevent a just inference of fraudulent intent.¹

An intent to hinder, delay, or defraud cannot, it has been held, be inferred from the fact that the assignor in an assignment for creditors is solvent, any more than it could be inferred from the fact that an assignor was insolvent.² In the case cited it was found as a conclusion of fact that when the assignor made the assignment he supposed that his property was sufficient to pay his debts; and from this it was argued that he must have had a fraudulent intent. A debtor, pressed for payment and fearing a sacrifice of his property, had no right to withdraw it from legal process and delay his creditors by interposing an assignment. But the court denied the argument; the argument, it was said, would apply equally to the case of an admitted insolvency.³

¹ *Shultz v. Hoagland*, supra. The omission in such a case would probably raise a presumption of fraud. Finch, J. in *Shultz v. Hoagland*: 'It would be hard to find any schedule absolutely perfect, or any debtor who could inventory every item of his property with strict accuracy. Room must be allowed for honest mistake, and possibly even for careless and thoughtless error; but where the omission cannot thus be explained or excused, the inference of a fraudulent intent must follow.'

² *Ogden v. Peters*, 21 N. Y. 23. See however *Planck v. Schermerhorn*, 3 Barb. Ch. 644, 646, ante, p. 296.

³ *Comstock, C. J.*: 'As assignments for the benefit of creditors are generally made by insolvent debtors, it is not unfrequently urged that such disposi-

tion of property can be made only by that class of persons. But this doctrine has no foundation in principle or authority. These assignments are in their nature simply trusts for the payment of debts. The power to create such trusts is certainly not peculiar to insolvent men. On the contrary it is a power more unquestionably possessed by men who are entirely solvent.' *Selden, J.* however thought that where the assignment was made by a solvent person, there was a presumption that the act was done to increase an anticipated surplus for himself, i. e. that it was done with fraudulent intent. And see *Planck v. Schermerhorn*, supra; *Gardner v. Commercial Bank*, 95 Ill. 298, and *Van Nest v. Yoe*, 1 Sandf. Ch. 4, to the same effect.

CHAPTER XIII.

INTENT TO DEFRAUD CONTINUED: RETAINING
POSSESSION.

§ 1. THE PRINCIPLE: POSSESSION.

BECAUSE it is naturally a sign of ownership, possession of chattels raises in law a presumption of ownership in the possessor.¹ This presumption however is often untrue in point of fact, and, except in those states in which the presumption is declared to be conclusive towards third persons, it may not be sufficient to save a creditor, who has levied upon goods which really do not belong to his debtor, when the true owner makes his claim before the courts. At the same time possession being the visible sign of ownership, it is the basis often upon which a levy upon the goods as the property of the possessor is made, and in a contest upon the question whether the property may be treated as that of the possessor, in a word, whether the claimant's claim arose in fraud of the rights of creditors, the fact of possession by the debtor may constitute the whole of the particular creditor's case.

The creditor's case indeed resolves itself into this: When it turns out that property which a creditor has levied upon in the hands of his debtor, as his debtor's property, is claimed by a third person, a presumption (*prima facie* or absolute, according to local law) arises, in cases not falling within certain exceptions, that that person's claim was founded upon

¹ 'Possession is *prima facie* evidence of ownership.' Pollock & Wright, *Possession*, 25. This though said with reference to possessory actions is equally true, so far as chattels are concerned, but no further, for the purposes of the statutes against fraudulent conveyances. As to possession of land, see *infra*, § 5.

a transaction tainted with 'intent to delay, hinder, or defraud' creditors. When will this presumption fail? When will it stand?

The creditor's claim rests, and when not otherwise invalidated, may sufficiently rest, upon the debtor's possession. It does not rest upon the creditor's knowledge of that possession; it is not necessary for the creditor to show that he has been deceived by appearances, — that his debtor has been held out as owner, though such a fact would greatly strengthen his case and might alone be sufficient, against countervailing evidence, to establish it. It is not necessary even that the creditor should have known of the existence of the property before the levy;¹ enough, if the creditor's case otherwise is good, that the debtor was found in possession. A man in giving general credit seldom knows just what property his debtor owns; such credit is not based upon the debtor's ownership of any particular piece of property.²

Again since possession is the ground of the creditor's right to treat the property as his debtor's, it can make no difference

¹ But see *Gentry v. Cowan*, 66 Ga. 720, turning upon special statute.

² *Tilghman, C. J. in Martin v. Mathiot*, 14 Serg. & R. 214: 'Neither is it necessary that it should appear that credit had been given by a third person in consequence of the possession of the purchaser. A rule of law so restricted would be of little value. It rarely occurs that a man can prove what it was that induced him to give credit. It is a rule of general policy, which declares possession to be the evidence of property, and the presumption is that every man is trusted according to the property in his possession.' This general language was applied to the case of a conditional buyer in possession, to whom title had not yet passed, the case before the court.

Can it make any difference that the creditor in point of fact knows of the transaction constituting the supposed sale, at the time of giving the credit? It would seem not, if the sale would not be good against any creditors. But see *Vanmeter v. Estill*, 78 Ky. 456. In *Parsons v. Hatch*, 63 N. H. 348, where the creditors knew of the transaction and any defect in transferring possession, if there was any, the creditors appeared to have been estopped to impeach the sale. They were employees both of the vendors and of the buyers of the property, a mill; and the court said that they 'were so far parties to the sale as to have no cause to complain of any want of completeness in the change of possession;' and they had 'assented by deriving from it a valuable security.'

under what form of transaction the claim of the third person arises. Commonly such person claims under a sale, and the usual way of stating the rule is to say that possession retained by a vendor shows (presumptively or absolutely, according to the local law) that the sale was fraudulent against the vendor's creditors; but that is only the typical example. The claimant's claim is no better, or worse, for being in the form of a trust,¹ lien, or other estate or interest. The creditor's case is that the claim is founded in intent to delay or defraud him; which intent he supports by the possession of his debtor.²

Now this possession must be in the manner of ownership; that may be set down as the cardinal feature of the case. We have then to consider what constitutes that sort of possession; and here two things must be clearly distinguished. The first is, what may be sufficient to constitute possession for other purposes; the second is, what constitutes change of possession. This second question will be considered in its place somewhat later; all that it is needful here to say is, that, though it is one of the tests of intent to defraud, it has nothing to do with the present inquiry, in regard to possession in the manner of ownership. In regard to 'possession for other purposes,' such as trespass, trover, or replevin, it is important to notice the difference between such cases and the subject of our main inquiry. Trespass and the like actions do not look necessarily to ownership even presumptive, though it may turn out that a question of ownership must be decided; they are actions for the vindication of possession, not of possession in the manner and as the mark of owner-

¹ As to transferring possession in cases of assignment for creditors, see the discussion in *Goodwin v. Kerr*, 80 Mo. 276; *Adams v. Davidson*, 10 N. Y. 309; *Burrill, Assignments*, § 277.

² The result is, that where the attaching creditor prevails, he does not prevail subject to the rights of the

claimant, as in the case of an unpaid vendor. The transaction being fraudulent towards the creditor, he takes not merely the right of his debtor measured by his relations with the vendor, but the property as property owned entirely and fully paid for by the debtor.

ship. Hence whether, as regards personal property, there is a possession in that manner and by that mark is not material; there need be no true possession at all; enough that there is a right to have possession; and where there is a true possession, there need be nothing more. No one's rights can be affected by allowing the action.

Very different is it with regard to the question of possession touching the law of alienations in fraud of creditors. If a creditor is entitled to seize property in the hands of his debtor, which between the debtor and the claimant is owned by the latter, it must be upon the footing of a possession in the manner of ownership; for it is the debtor's property that is to be taken. Possession by the debtor may not then be enough. And again it cannot be enough that the debtor has a right to have the possession of property in another's hands, for his right may not involve any right of ownership.

The possession of the debtor which will justify his creditor in seizing property belonging in point of fact to another must, it is apprehended, be based upon three facts: first, that the debtor has control of the property; secondly, that such control is exercised by the debtor in the manner of ownership; and thirdly, that such control must be with the consent of the claimant. Of course the creditor may take property of the debtor which is not in the debtor's possession at all; but if his case turns upon the debtor's possession, he will fail if any of the three facts stated are absent. These elements of possession should be considered separately.

First, then, of control. All that need be said on this head however is to state a distinction. One is said to have control over property when one may extend control over it at will; that is, where there is no resistance. The delivery to the grantee of a deed conveying land, however far away, gives to him control over the property if no one is holding it against

him ; and the like would be true of a conveyance of personal property under the same circumstances. But what we are speaking of in this chapter is the *retaining* of possession ; and it must be observed of both the cases just put that, while for other purposes, as e. g. for the purpose of a suit for trespass, the buyer is in control (and has possession), the seller may, for our present purpose, have control and have possession of the property. Indeed there is nothing technical or metaphysical in the idea of control in relation to the present subject, as there often is in its relation to other subjects ; control here is simply matter of observation of the senses ; the debtor is *seen* in the exercise of control over the property which he has conveyed to another. Thus there is no question of the application of the notion of control to things of whose existence the person may be unaware, such as copper at the bottom of a canal ; here the debtor knows all, and acts accordingly. And it is (so far) because he so acts that it is considered that the alienation in question is fraudulent.

Secondly, of control in the manner of ownership. The subject of bailment affords an illustration of this matter. A bailee as such does not hold in the manner of ownership ; and it is well settled that the property cannot be seized for his debts.¹ Some aspects of this matter have however been the subject of conflict of authority. An owner transfers to

¹ *Rose v. Story*, 1 Barr, 190 (drawing the distinction between bailment and sale) ; *Rowe v. Sharpe*, 51 Penn. St. 26 ; *Emmons v. Westfield Bank*, 97 Mass. 230 ; *Deere v. Needles*, 65 Iowa, 101 ; *Carpenter v. Graham*, 42 Mich. 191 ; *Buhl Iron Works v. Teuton*, 67 Mich. 628, 629, 630 ; *Stowe v. Taft*, 58 N. H. 445 ; *Patten v. Clark*, 5 Pick. 5. 'Certainly,' said Parker, C. J. in *Patten v. Clark*, 'a person may place property in the hands of a poor man to enable him to trade with it and gain a subsistence from the profits, without

exposing it to seizure by his creditors.' See *Emmons v. Westfield Bank*, *supra*, a case of materials to be made up. But it is equally clear, of such a case as that especially, that the transaction may be colorable. *Ib.* Indeed such a case would often be merely a loan on mortgage ; and for the mortgagee to allow the mortgagor to have control and full enjoyment of the property mortgaged is a very different thing from an ordinary bailment, though it is allowed in many states. See chapter 10.

another the possession of a chattel upon a contract of purchase, retaining the title in himself until the happening of some event, such as full payment of the price. Some courts hold that in such a case the property can be taken for the debts of the transferee, though he is only a bailee;¹ other courts hold the contrary.² But this dispute does not involve any doubt about the rule in regard to a proper bailment; the difficulty here relates to the character of the act. It is a bailment, it is said, and something more; towards creditors it is a 'holding out' of the supposed bailee as owner; the bailee has control, he has control in the manner of an owner, and this with the consent of the claimant. This, in a question of creditors' rights, appears to be the better view.³

¹ *Martin v. Mathiot*, 14 Serg. & R. 214; *Thompson v. Peret*, 94 Penn. St. 275; *Peek v. Heim*, 127 Penn. St. 500; *Rawson Manuf. Co. v. Richards*, 69 Wis. 643; *Thomas v. Richards*, ib. 671; *State v. Martin*, 77 Mo. 670. It matters not what form the transaction takes; the effect may result from an apparent consignment of goods. *Peek v. Heim*, supra. The law of Wisconsin is statutory. See the Wisconsin cases just cited.

² *Cole v. Berry*, 42 N. J. 308; *Capron v. Porter*, 43 Conn. 383; *Lucas v. Birdsey*, 41 Conn. 357. *Comp. Tomlinson v. Roberts*, 25 Conn. 477.

³ If however in such a case of contract for purchase and transfer of title on payment, no change of possession is made after payment, the property remaining in the hands of the vendor, then, though the buyer has all the time been, and continues after payment to be, in the employ of the seller, and all the time has treated the property as his, as by paying expenses incurred upon it, the property may be taken by the vendor's creditors. *Hull v. Sigsworth*, 48 Conn. 258. Quoting *Norton v. Doo-*

little, 31 Conn. 405, the court said that there must be 'an actual, visible, and continued change of possession. . . . Purchasers must learn and understand that if they purchase property, and without legal excuse permit the possession to remain in fact or apparently and visibly the same, or, if changed for a brief period, to be apparently and visibly continued as before the sale, they hazard its loss by attachment for the debts of the vendor.' See also *Rose v. Story*, supra, and what now follows in the text concerning ordinary sales (i. e. with transfer of title), without change of possession.

As to concurrent or mixed possession see *infra*, p. 333. And as to property in the course of manufacture, as e. g. the timbers of a ship or the parts of a sewing-machine, the same not being the property of the person who is finally to own the completed article, see *Clarke v. Spence*, 4 Ad. & E. 448 (ship); *Shaw v. Smith*, 48 Conn. 306 (sewing-machine); *Williams v. Jackson*, 16 Gray, 514; *Andrews v. Durant*, 1 Kern. 35, reviewing the authorities; *McCombe v. New York & Erie R. Co.* 20 N. Y. 495;

Where there is, in truth, a 'holding out,' the case is clear, though that holding out may only be the *effect* of the claimant's act, permission, or omission, and not his actual intention.¹ Thus it often happens that the owner of a chattel conveys the same, with possession, to another subject to some condition subsequent; the title is to revert in the seller e. g. upon the failure of the buyer to make payment according to the terms of the contract of sale. Towards creditors of the conditional buyer, the buyer is, by the better rule, the complete owner; the property can be taken upon that footing; the seller can make no claim until the creditor is satisfied of his claim.² But such cases are to be sharply distinguished from cases in which one man furnishes materials to another to be made up for the former into some article of trade; there is no 'holding out' in transactions of that sort.³

A more serious question touching bailment often arises. May the buyer make the *seller* his bailee? That question would not be peculiar but for the rule of the common law, and of statute under various forms, requiring a continuous change of possession. The question therefore calls for consideration, not in this place, but under the second branch of our subject, to wit Change of Possession.

Thirdly, of the buyer's consent. This element of possession distinguishes the case radically from possession for the

and other cases cited in *Shaw v. Smith*, *supra*. The general rule in such cases is that the things going to make the completed article can be taken by the creditors of the vendor. *Ib.* If the manufactured article is to be the property of the capitalist who also has furnished the materials, it can only be taken for his debts. 'Such a case is not like the continued possession of a vendor after sale.' *Emmons v. Westfield Bank*, 97 Mass. 230. But these are questions of title more than of fraud.

¹ See *Erdman v. Rosenthal*, 60 Md. 312; *Ludwig v. Highley*, 5 Barr, 132, 141, *permissive* holding of chattels as owner. See *ante*, pp. 44, 45, note; *Bigelow, Estoppel*, 560, 564, 5th ed.; *Ray v. McPherson*, 11 Neb. 197, *land*; *Wake v. Griffin*, 9 Neb. 47.

² *Rose v. Story*, 1 Barr, 190; *Chamberlain v. Smith*, 44 Penn. St. 431. *Contra*, *Marvin Safe Co. v. Norton*, 48 N. J. 410; *Cole v. Berry*, 42 N. J. 308.

³ *Emmons v. Westfield Bank*, 97 Mass. 230, *supra*, p. 331, note.

purposes of trespass. A disseisor may maintain trespass; but the land held by a disseisor cannot be taken for his debts, against the rights of the owner, except in so far as the growing interest of the disseisor may have acquired some value; and so generally, property which a debtor has taken possession of, or has wrongfully kept, against the will of the owner, may be taken for the owner's debts, but not, unless there has since been a 'holding out,'¹ for the debts of the possessor.² But if the claimant (owner) assented to the debtor's taking or retaining possession, then there is a case for the operation of the statutes under consideration. Nor, according to the better view, will it help the claimant's case that he has afterwards³ withdrawn his assent and demanded and even obtained the possession; at all events in those cases in which the original transaction between him and the debtor was fraudulent as matter of law, and not merely *prima facie* fraudulent. But this is anticipating a subject which must be considered specially in another connection.⁴

Thus far of what constitutes possession for the purposes of the statutes against fraudulent conveyances. But to enable the creditor to treat the transfer as fraudulent it is not necessary that the debtor-vendor's possession should be exclusive; the 'intent' of the statutes is made out (*prima facie* or absolutely) as well where the debtor is found exercising ownership along with others, that is, where the possession is concurrent, confused, or mixed.⁵ Thus a man sells his shop and business,

Supra, p. 332. The term 'holding out,' it is to be noticed, is a technical term and means not merely an actual, intentional grant of authority, but doing what as matter of law amounts to a grant of authority.

² *Simms v. McKee*, 25 Iowa, 341, mortgaged goods held by mortgagor after default against the mortgagee's will.

³ By 'afterwards' here is meant at

some distinctively later time, and not while the transaction may still be considered as *in fieri*.

⁴ 'Purging fraud' is referred to *infra*, pp. 339, 340, notes, and more fully considered in chapter 16.

⁵ *Babb v. Clemson*, 10 Serg. & R. 419; *Avery v. Street*, 6 Watts, 247, 249; *McVicker v. May*, 3 Barr, 224; *Brown v. Keller*, 43 Penn. St. 104;

and notifies his men; the buyer comes, and without any outward change, goes into possession and retains the seller in the business as manager. This would be a case of concurrent or mixed possession between the seller and the buyer, and the property could be taken by creditors of the seller.¹ Again the stock in trade in a hotel is bought, and the buyer takes possession and control; but the seller and his family remain in the hotel, and, though they act under the direction of the buyer, there is nothing to indicate any change of management of the business. This is a case of concurrent possession, and the sale is a fraud upon the seller's creditors.²

In the foregoing paragraphs we have considered the relation of the statutes concerning fraudulent conveyances to the *debtor's* side of this question of retaining possession; that is, we have considered what constitutes possession of the debtor such as will justify a levy. But the correlative relation of

Miller v. Garman, 89 Penn. St. 134; *Worman v. Kramer*, 73 Penn. St. 378; *Sumner v. Dalton*, 58 N. H. 295; *Plaisted v. Holmes*, *ib.* 293 and 619; *Lang v. Stockwell*, 55 N. H. 561, 565; *McAfee v. Bushy*, 69 Iowa, 328; *Wright v. McCormick*, 67 Mo. 426. Comp. *Barnstable v. Thacher*, 3 Met. 239. See also *Jordan v. Frink*, 3 Barr, 442. In this last case A sold a horse to B, who took it away. Shortly afterwards B sold the horse to A's minor son, who took it back to his father's, where it was levied on as property of the father. Held that it was for the jury to say whether there was fraud. Further see *Lake v. Morris*, 30 Conn. 201.

¹ But if in such a case the buyer substitute his own sign for the old one, or sufficiently indicate the change on the existing sign, the change will be sufficient. *Woods v. Berry*, 7 Mon. 195. See also *Ford v. Chambers*, 28 Cal. 13; *post*, p. 842.

² *Miller v. Garman*, 69 Penn. St. 134. Further in regard to this subject see *infra*, pp. 341, 342.

In *Babb v. Clemson*, 10 Serg. & R. 449, Duncan, J. said: 'There cannot be a concurrent possession in the assignor and the assignee; it must be exclusive or it is deemed colorable and fraudulent. To defeat an execution there must have been a bona fide, substantial change of possession. It is a mere mockery to put in another person to keep possession jointly with the former owner. I presume the debt . . . to be a just one. . . . But the plaintiff's own case showed a visible possession to all the world remaining to the debtor just as it did before the assignment.' See also *Richardson v. Coddington*, 49 Mich. 1, lease to wife with management in husband, who had been lessee but had surrendered his lease.

the claimant to the property also affords a test of the question of fraudulent intent, and in fact is dwelt upon by the law even more; that side of the matter relating directly to the facts which make a good title in the claimant-buyer. In a word the law treats of the question of intent to defraud in the particular transaction either from the side of the debtor's possession in the manner of ownership or from that of *change* of possession to the claimant, or from both sides at one and the same time. We have then to consider, in the next place, the subject of change of possession.

§ 2. CHANGE OF POSSESSION.

Change of possession, which, in finding the 'intent' of the statutes, may be termed the correlative test to possession itself, is defined or described in various terms both by the common law and by statute. The statutes of Elizabeth make no specific mention of possession; the law relating to those statutes being a matter entirely of judicial construction. In this country we have a great variety of statutes directed to this matter specifically, though sometimes, as in the legislation of New York, directed primarily to settling the vexed question whether retaining possession of chattels aliened is to be considered as making a conclusive or only a *prima facie* case for the creditor.

This legislation, which has been widely copied, provides in substance that every sale by a vendor of goods in his possession or under his control, and every assignment¹ of goods by way of mortgage or security, or upon any condition whatever, unless accompanied by an *immediate* delivery and followed by an *actual* and *continued* change of possession shall be presumed to be fraudulent and void against creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclu-

¹ This is omitted from the Missouri statute, which otherwise is the same. *Goodwin v. Kerr*, 80 Mo. 276.

sive evidence of fraud unless shown to have been made in good faith, and without intent to defraud such creditors or purchasers. This provision is not to apply to contracts of bottomry or respondentia, or to assignments or hypothecations of vessels or goods at sea or in foreign ports. A slightly later statute of New York,¹ also much copied, provides in effect that mortgages of goods not accompanied by immediate delivery and followed by actual and continued change of possession shall be absolutely void against the creditors of the mortgagor and against subsequent purchasers and mortgagees in good faith, unless the mortgage or a copy shall be filed (for registration) according to law.

The statutes of Illinois provide that conveyances of goods and chattels on consideration not deemed valuable shall be taken to be fraudulent, unless by will proved and recorded or by deed acknowledged, proved, and recorded, or unless possession shall really and bona fide remain with the donee.² And the next section speaks also of the possession of chattels loaned 'remaining' for a certain time³ in the possession of the taker, subject to rights of the lender, and for that reason being liable to the taker's creditors.³ The statutes of Indiana declare that sales of goods by one in possession or control, unless accompanied by immediate delivery and followed by an actual change of the possession shall be presumed, *prima facie*, to be fraudulent.⁴ And the statutes of Missouri provide that sales of goods and chattels by one in possession or having control shall be held to be fraudulent, unless accompanied by delivery in a reasonable time (regard being had to

¹ Laws of 1833, c. 279; ante, pp. 86, 87. A mortgage may be good against creditors though it is never recorded. *Coykendall v. Ladd*, 32 Minn. 529.

² Rev. Stats. 1874, c. 59, § 6. So in substance in Missouri. Gen. Stats. c. 107, § 4.

³ Like provisions are to be found in the statutes of other states, as e. g. in Kentucky, Missouri, and Mississippi. Gen. Stats. Ky. c. 44, Art. 1, § 4; Gen. Stats. Mo. c. 107, § 5; Rev. Code, Miss. 1871, § 2893.

⁴ Rev. Stats. 1876, c. 122, § 8.

the situation of the property), and followed by an actual and continued change of the possession.¹ In Kentucky alienations or charges upon personal property, unless actual possession in good faith accompanies the same, are void as to creditors (and purchasers without notice) before recording.²

These statutes may be taken as fairly expressing the general spirit of the legislation throughout the country, touching the subject in hand. Through all divergences of language, whether of the common law or of statute, it is believed that the legal conception of a change of possession of chattels requires a delivery, which must be (1) speedy, (2) notorious, (3) and followed by continuous possession; and that nothing else is required. These elements of change of possession will now be the special subjects of examination.

And first of mere delivery, that is, delivery apart from its concomitants above stated. In its natural sense this means a handing over; and a real handing over, i. e. a transfer from the hand of the seller to the hand of the buyer, will always satisfy this part of what is to be done. But the term 'delivery' is not to be restricted to any such mode of transfer. The debtor must not *retain* possession; that is the real requirement of the law. Now the property, for one reason or another, may be incapable of any handing over in the ordinary sense; in such a case it should be enough, and it is enough, for the vendor to withdraw from it, upon the completion of the transaction and leave it with the buyer. What difference, it has well been asked, whether I remove property from me which I sell, or remove myself from the property?³ The matter of possession is a thing of substance not of modes. It is not the place where the property lies, but the connection of that place with the owner, that shows the possession;⁴ and

¹ Gen. Stats. c. 107, 10.

² Gen. Stats. c. 44, Art. 1, § 3.

³ Agnew, J. in *Barr v. Reitz*, 53 Penn. St. 256.

⁴ *Ib.* 'On the sale of goods and chattels they must either pass out of the seller to the buyer, or the seller must pass away from them, leaving them in

so far as the element of mere delivery is concerned, complete bona fide withdrawal of the seller is probably sufficient in all cases.

In the next place the delivery should be speedy. This term 'speedy' is used to bridge over any apparent difference between those provisions of statute, as in New York, which require the change of possession to be 'immediate' and those, as in Missouri, which require that it shall be within 'reasonable' time. The two terms would doubtless be considered to have the same meaning; both would require, and each would be satisfied with, delivery made in as speedy time as practicable.¹

The property may be in such a situation that immediate change of possession, literally, is not practicable, as e. g. where the subject of sale is a herd of cattle roaming at large over the area of an extensive ranch. In such a case the law is satisfied if the parties exercise reasonable diligence in effecting the change. Reasonable time is allowed for making all needful preparations, and for separating the property from other property not sold, and for marking or branding the same when that is usual or necessary. And in the case of cattle roaming at large as above indicated, they may be allowed to pasture in the same tract after the separation and branding, as before.² So in regard to growing crops, these may be the

the exclusive possession of the buyer.' Thompson, C. J. in *Garman v. Cooper*, 72 Penn. St. 32. 'A change of location of the property is not essentially necessary.' Mercur, J. in *Crawford v. Davis*, 99 Penn. St. 576.

¹ See *Cass v. Perkins*, 23 Ill. 382, where the words are used synonymously. Comp. also the requirement of 'immediate' notice of loss under an insurance policy; that is satisfied with notice as soon as practicable under the circumstances. See e. g. *Provident*

Life Ins. Co. v. Baur, 29 Ind. 236; *Railway Passengers' Assur. v. Burwell*, 44 Ind. 460.

² *Walden v. Murdock*, 23 Cal. 540. A fortiori, where the cattle are driven into a corral, and the seller says to the buyer, 'Here are your cows that you bought;' though the buyer requests another now to take care of them, and the cows are accordingly turned back into the same pasture. *Morgan v. Miller*, 62 Cal. 492. Further see *Tunell v. Larson*, 39 Minn. 269.

subject of a valid sale before they are harvested, delivery being therefore properly deferred for the ripening and harvesting.¹

Further the rule which requires an immediate delivery is deemed to be in the interest of the attaching creditor; and it has been laid down that if he does not move in the matter, he cannot afterwards object that the transfer was delayed. Indeed it seems to be deemed enough, if there is no other indication of fraud,² that the property has been delivered to the buyer before the attachment has been made, whatever the interval of time since the sale.³ That is to say, retaining possession after sale is, according to this doctrine, nothing in itself, unless positive law makes it a case of absolute fraud; it is possession in the vendor at the time of the attachment that shows the intent to defraud. Thus where the vendor of a chattel had kept it in his possession for eight months after

¹ *Bernal v. Hovious*, 17 Cal. 541; *Vischer v. Webster*, 13 Cal. 58. See also as to crops cut, *Hamblet v. Bliss*, 55 Vt. 535.

² As by giving to the vendor the right to use and enjoy the property as his own. See chapter 10.

³ *Bartlett v. Williams*, 1 Pick. 288; *Calkins v. Lockwood*, 16 Conn. 276; *Hall v. Gaylor*, 37 Conn. 550; *Gibbert v. Decker*, 53 Conn. 401, and cases cited (among them, *Coty v. Barnes*, 20 Vt. 19; *Kendall v. Sampson*, 12 Vt. 515; *Cruikshank v. Cogswell*, 25 Ill. 366; *Blake v. Graves*, 18 Iowa, 312); *Dolan v. Demark*, 35 Kans. 304; *Cameron v. Marvin*, 26 Kans. 612; *Robinson v. Donell*, 2 Barn. & Ald. 134.

The cases which are, or seem to be, opposed to this rule are reviewed in *Gibbert v. Decker*, supra. They are *Carpenter v. Mayer*, 5 Watts, 483; *Gardiner v. Tubbs*, 21 Wend. 169; *Franklin v. Gummersell*, 9 Mo. App. 84; *Cheaney v. Palmer*, 6 Cal. 119; *Watson v. Rogers*, 53 Cal. 401. The court in *Gib-*

bert v. Decker thought that *Carpenter v. Meyer*, supra, had been practically overruled by *Hoofsmith v. Cope*, 6 Whart. 53, and *Smith v. Stern*, 17 Penn. St. 360. The case of *Gardiner v. Tubbs* was thought distinguishable on the ground that there was clear and positive fraud in the way of a trust (which supports one of the distinctions of the text), and was treated as inconsistent with *Levin v. Russell*, 42 N. Y. 251, and *Murray v. Riggs*, 15 Johns. 571. And the cases in Missouri and California were said to turn upon statute.

It is to be observed however that while *Gibbert v. Decker* would be right under the rule that retaining possession after sale makes only a prima facie case of fraud, the rule in the state in which that case was decided makes such retention conclusive of fraud. Under that rule there is more doubt whether fraud can be purged, without the consent of the parties upon whom it is practised. See chapter 16.

a bona fide sale, before delivering it, it was held that a creditor attaching after the delivery could not upset the sale merely because possession had been retained.¹ Whether this would be true under enactment like that of New York,² is not altogether clear. And such cases should probably be distinguished from cases in which the vendor is allowed to have the use and enjoyment of the property as his own,³ and perhaps, as has been intimated above, from cases arising where the retention of possession is deemed absolutely fraudulent.⁴

In the next place of the notoriety of the delivery. The term 'notoriety' is not to be taken in a literal, indeed in many cases not even in its natural and ordinary, sense. It does not mean that there must be witnesses to the transaction, nor even that it must be made known to the neighborhood; though if such things were shown, the requirement of the law, so far as this matter is concerned,⁵ would be fulfilled. The term, rather, taken alone, appears to be intended to indicate that the law will not be satisfied with a secret delivery, where the property thereafter is kept from sight though in the hands, it may be, of the claimant, and not under the control of the debtor. Such a state of things (at all events if unexplained) would show an intent in the transaction to defraud.

Accordingly it is laid down in New York that the statutory

¹ *Bartlett v. Williams*, supra.

² Ante, p. 36.

³ Mortgages, with right reserved or given to the mortgagor to retain possession and use, enjoy, and sell for his own purposes, especially in the case of stocks of merchandise, make a special subject. See chapter 10. The surrender of the goods, in such cases, to the mortgagee raises a question of the possibility of 'purging fraud.' See chapter 16.

⁴ This case also raises a question of the possibility of purging fraud. But in Connecticut, in which the absolute rule

prevails (*Capron v. Porter*, 43 Conn. 383, 388), the question still is of possession at the time of the creditor's attachment. *Gibbert v. Decker*, supra. So in other states. *Cruikshank v. Cogswell*, 26 Ill. 366; *Blake v. Graves*, 18 Iowa, 312; *Kendall v. Sampson*, 12 Vt. 515. See chapter 16.

⁵ But no further; the presence of witnesses will not satisfy the whole requirement of the law. *Cutting v. Jackson*, 56 N. H. 253; *Wolf v. Kahn*, 62 Miss. 814.

requirement of an actual and continued change of possession means an open public change, to continue and be manifested by outward and visible signs, such as to make it clear that the debtor's possession has come to an end.¹ In that statement the element of continuousness is associated with that of notoriety; but that may be separated, it seems, and still leave sufficient substance for the idea of notoriety alone, for the statement is that the change must be 'open.' And other courts have found frequent occasion to enforce and to emphasize the fact. Thus in Missouri and in other states it has often been said that delivery must be open, notorious, and unequivocal.²

This requirement of notoriety has a special bearing upon cases in which the debtor-seller is, after the sale, taken into the employment of the claimant, and as such has more or less management of the property; this taking the debtor into employment, when real,³ will not enable the creditor to treat the transaction as fraudulent, if the delivery was notorious.⁴ The following example will show what is meant: A father, keeper of a hotel, sells the hotel furniture and business to his son, for valuable consideration; whereupon the son moves the property into another hotel, which he now stocks and opens, and receives into the house his father, mother, and sister, all being taken into his employment in various ways,

¹ *Steele v. Benham*, 84 N. Y. 634, 638; *Topping v. Lynch*, 2 Robt. (N. Y.) 488; *Hale v. Sweet*, 40 N. Y. 97; *Brunswick v. McClay*, 7 Neb. 137, mortgaged chattels put in nominal charge of mortgagor's servant.

² *Stewart v. Nelson* 79 Mo. 524; *Wright v. McCormick*, 67 Mo. 426; also *Chamberlain v. Stern*, 11 Nev. 268; *Gray v. Sullivan*, 10 Nev. 416.

³ The transaction may be only a sham. *Gollober v. Martin*, 33 Kans. 252; *Godchaux v. Milford*, 26 Cal. 316. But where the act is genuine,

nor of continuousness is violated. *Godchaux v. Milford*, supra; *Morgan v. Miller*, 62 Cal. 492. See *Danley v. Rector*, 5 Eng. (Ark.) 211, which goes rather far.

⁴ *McVicker v. May*, 3 Barr, 224; *Billingsley v. White*, 59 Penn. St. 464; *McMarlan v. English*, 76 Penn. St. 296; *Ziegler v. Handrick*, 106 Penn. St. 87; *Bird v. Andrews*, 40 Conn. 542; *Godchaux v. Milford*, 26 Cal. 316; *Ford v. Chambers*, 28 Cal. 13; *Morgan v. Miller*, 62 Cal. 492; *Bernal v. Hovious*, 17 Cal. 541; *Vischer v. Webster*, 13 Cal. 58; *Macomber v. Parker*, 14 Pick. 497.

— the mother and sister keeping house for him and the father doing 'jobs' about the premises. The delivery is notorious.¹ Another case: two brothers, coachmakers, became insolvent and sold their stock in trade to a third brother, who had been in the shop before and who now took control, continued the business in his own name, procured another bookkeeper, and opened new books. Both the sellers remained as employees, each superintending a particular department of the business, at stipulated wages. The delivery of possession is notorious and good.²

A case may be put in contrast: The owner of a shop sells it to one of his employees, notifies his men of the sale, and then leaves, the old sign remaining and nothing else being done to indicate any change of ownership. That falls short of the requirement of notoriety;³ though a little more might be sufficient.⁴ The question sometimes arises in cases like the foregoing whether the buyer of personalty can immediately make the seller his bailee; that question will be considered in the next section.

Again the requirement of notoriety becomes important where the property is of such a nature or is so situated that it cannot be delivered into the hands of the buyer in the ordinary sense. Apart from certain exceptions to be noticed in another section, it will not suffice to protect the claimant-owner from a total want of any act looking to delivery, that the property was, by nature, by its position or occupancy, or for any other reason, incapable of delivery in the ordinary sense; something should be done to *signify* delivery.⁵ This

¹ Comp. *McVicker v. May*, 3 Barr, 224, a case turning upon the question whether the possession was mixed or concurrent between the son and the father.

² *Dunlap v. Bournonville*, 26 Penn. St. 72; *Crawford v. Davis*, 99 Penn. St. 576. Comp. *Howe v. Keeler*, 27 Conn. 538; *Woods v. Bugbey*, 29 Cal. 466.

³ *Wright v. McCormick*, 67 Mo. 426.

⁴ *Ford v. Chambers*, 28 Cal. 13; *Woods v. Berry*, 7 Mon. 195; ante, p. 334.

⁵ *Clow v. Woods*, 5 Serg. & R. 275. See *Nuckolls v. Pence*, 52 Iowa, 581; *Woods v. Bugbey*, 29 Cal. 466; *Lake v. Morris*, 30 Conn. 201; *Gaylor v. Harding*, 37 Conn. 508, machinery in

may be illustrated by a leading case¹ in Pennsylvania. Trespass was brought for levying on goods in execution under the following circumstances: To secure two creditors, the plaintiffs, a debtor executed to them a mortgage of the bark and implements in his tanyard, and also of his skins and leather unfinished in bark and vats for tanning; the deed providing that the mortgagor should remain in possession for the purpose of working, tanning, and finishing the leather. The mortgage was not recorded; and the mortgagor continued in possession according to the deed, until the levy. No delivery of any sort was made to the mortgagee; no schedule of the property, no inventory, or appraisement was made. It was held that the transaction was fraudulent;² there should have been some description of the property either in a schedule or in the body of the instrument. That appears to mean that there should be something in the nature of an act of separation and identification.³

a factory treated as personalty, and delivery by change of possession held necessary. See May, *Fraudulent Conveyances*, 114, 2d ed.

Bricks in a kiln are proper subjects for a substantial change of possession. *Richards v. Shroder*, 10 Cal. 431; *Woods v. Bugbey*, *supra*. So of hay in a barn. *Merrill v. Hurlburt*, 63 Cal. 494. So of quantities of wood corded up. *Wilson v. Hill*, 17 Nev. 401. See *Schmidt v. Nunan*, *ib.* 371, hay to be delivered at a landing, and there delivered on board ship; held good. As to charcoal in pits see *Tognini v. Kyle*, 17 Nev. 209.

But only such change as the nature of the case permits is required. *Gough v. Everard*, 2 Hurl. & C. 1, 8; *Mair v. Glennie*, 4 Maule & S. 240; *Clow v. Woods*, *supra*, note 5.

¹ *Clow v. Woods*, *supra*.

² It was held fraudulent *per se*, but that is not material here. The Penn-

sylvania rule in regard to possession is more severe, as we shall see, than that which generally prevails.

³ In one of his ablest opinions, Gibson, J. (afterwards C. J.) said: 'Where from the nature of the transaction possession cannot be given, the parties ought, in lieu, to do everything in their power to secure the public from that deception which the possession of property, without the ownership, always enables a person to practise. When a ship at sea is sold, the grand bill of sale is delivered, and that divests the owner of his last badge of ownership; and when goods are too bulky to admit of manual possession, the key of the room is handed over. . . . Here the defect is, that the articles conveyed are not described or particularized either in a schedule or the body of the instrument. This is fatal. In a case of this kind the slightest neglect in any circumstance the nature of the case may admit of as

The sale of a quantity of logs affords another illustration ; in such a case practice has generally proceeded as if upon the requirement of some significant act, besides withdrawal of the vendor. The quantity is ascertained and conspicuously marked with e. g. the name, or something to indicate to others the name, of the buyer ; and this practice, or something equivalent, appears to be required by law, and whatever else is practicable, so as to make the transaction notorious.¹ The rule of law, it is true, is that the transfer of possession need only conform to the nature of the property, and its situation ; 'the vendor must make such an actual delivery only as the nature of the property and circumstances of the case will reasonably admit.'² But all that can be done, for the protection of the public, to make known the change should be done.³

an equivalent for actual possession is unpardonable ' (see *Tognini v. Kyle*, 17 Nev. 209 ; *Wilson v. Hill*, ib. 401).

Duncan, J. : 'A bill of sale or a mortgage of a vessel at sea is valid provided the muniments respecting the title are delivered up, and possession, as soon as it can be conveniently done, taken of the ship on her return. *Morgan v. Biddle*, 1 Yeates, 3. In the case of a ship at sea mortgaged there must not only be a delivery of the documents, but all diligence must be used to take actual possession on her arrival in port ; and if a sale were made abroad, and possession delivered without notice of the mortgage, the sale would prevail. *Portland Bank v. Stubbs*, 6 Mass. 422, 425.'

The judges also pointed out the difference between lands and goods on the point of delivering possession ; possession of the former not being the legal evidence of title, while possession of the latter is strong evidence of ownership.

¹ *Cartwright v. Phoenix*, 7 Cal. 281 ; *Tognini v. Kyle*, 17 Nev. 209, charcoal

in pits ; *Wilson v. Hill*, ib. 401, large quantity of wood. See *Long v. Knapp*, 54 Penn. St. 514. Marking alone would not be enough. *Stewart v. Nelson*, 79 Mo. 524. Nor would measurement and marking, for other significant acts are practicable. *Stewart v. Nelson*, supra. See *Tognini v. Kyle*, and *Wilson v. Hill*, supra, as to putting a person in charge.

² *McMartin v. English*, 74 Penn. St. 296.

³ See *Stewart v. Nelson*, supra. The rule has sometimes been expanded, as e. g. as follows : ' In determining the kind of possession necessary to be given to the vendee to be good against creditors of the vendor, regard must be had not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property. No such change as will defeat the fair and honest object of the parties is required.' *Crawford v. Davis*, 99 Penn. St. 576, quoted in *McClure v. Forney*, 107 Penn. St. 414. See the important case of *Clow*

In the next place of the requirement that the change shall be continuous. Possession is in ordinary cases retained, within the meaning of the law, where it comes back to the late owner shortly after the transaction in question.¹ This may be illustrated by a Pennsylvania case.² A bargain had been concluded for the sale of a yoke of oxen; the oxen were delivered into the possession of the buyer; the buyer drove them to a blacksmith to be shod; and then, on the terms of a loan, returned them to the seller. While in the seller's possession they were levied upon as his property and sold; and the creditor prevailed over the claimant under the sale, the court holding that there must be, not only a delivery at

v. Woods, 5 Serg. & R. 275, *infra*, p. 351; *Cartwright v. Phoenix*, *supra*; *Buckley v. Duff*, 114 Penn. St. 596.

¹ *Young v. McClure*, 2 Watts & S. 147; *Hesthal v. Myles*, 53 Cal. 623; *Stevens v. Irwin*, 15 Cal. 503; *Van Pelt v. Littler*, 10 Cal. 394; *Hurlburd v. Bogardus*, 10 Cal. 518; *Chamberlain v. Stern*, 11 Nev. 268; *Gray v. Sullivan*, 10 Nev. 416; *Murch v. Swenson*, 40 Minn. 421. See *Richardson v. Coddington*, 49 Mich. 1; *Webster v. Bailey*, 40 Mich. 641.

Possession however does not come back to the late owner by reason of the mere fact that his wife shortly afterwards has temporary and partial possession of the property. *Towne v. Rice*, 59 N. H. 412, where the wife borrowed a horse and buggy-wagon from her neighbor and brother, the plaintiff, to whom the day before the husband had sold and delivered it, and went with her brother a journey. *Smith, J.*: 'The sale of the wagon was not fraudulent in fact or in law. The change of possession was such as usually follows a change of ownership. It was open, visible, and substantial, the wagon being immediately removed by the plaintiff to his own premises and taken into his

own exclusive possession. The subsequent hiring and use of the wagon by the vendor's wife was not a hiring or use by the husband. Her possession of the wagon as the bailee for hire of the plaintiff was not the possession of the husband nor of his agent. It does not appear that upon her return from Ware she parted with the possession of the wagon or put it into the possession of her husband.' On the wife's return the horse was put into the vendor's barn and the wagon left outside; the buyer then drew the wagon into the same barn for his own convenience and the safety of the property, where the whole was attached on the same evening. To this the same learned judge said: 'If the plaintiff's storing it in the barn for his own convenience and the security of the wagon was placing it in the vendor's possession, it was not such a possession by the vendor as under the circumstances shows that the sale was accompanied with a secret trust.'

² *Young v. McClure*, *supra*. We give it as stated by the court in *Garman v. Cooper*, 72 Penn. St. 32. This subject will be further considered in another section.

the time of the transaction, but a continuing possession thereafter.¹

A more recent case² in the same state affords another illustration. A portable mill, being personal property, had been levied upon by the defendant in the hands and as the property of one who had sold it to the plaintiff and had received it back from the plaintiff, as was alleged, in bailment. It was held that an instruction to the jury, to the following effect, which had been refused, should have been given: If the jury believe that F as agent of the buyer only superintended the removal of the mill from the place where it was on the day of the alleged sale, and its erection on the land of R, and then went away, leaving the seller in exclusive possession and control of the mill and the business pertaining to it, and that the seller afterwards employed and paid the hands, retained possession and conducted the business as before the sale, there was not such a change of possession accompanying and following the sale as the law requires.³

The possession of the *buyer* is continuing though after a considerable lapse of time, during which he has been in full, open, and exclusive control, the property finds its way back into the hands of the seller. A recent case⁴ will serve for illustration. A debtor sold and delivered to the plaintiff the

¹ And this must be shown by the claimant. *Ib.* The decision was upon the statute of 13th Elizabeth, and conforms at the same time to the language of our special statutes concerning change of possession.

² *Garman v. Cooper*, *supra*.

³ It had been left to the jury to say whether there had been such a delivery of possession as would give notice to the world of the change of ownership, notwithstanding the bailment to the seller, whereby the property went back to the seller after a short interval. 'This instruction,' it was now said, 'abrogated

the rule of law in cases of temporary changes of possession of personal property when sold, and substituting therefor the uncertain conclusions of the jury in the point of what should be a sufficient delivery to indicate a change of possession of property capable of actual, manual change of possession.' 'In all cases,' it was also said, 'where the delivery has been but temporary, and followed by a return to the seller, the law regards it as colorable and fraudulent in law.'

⁴ *Bond v. Bronson*, 80 Penn. St. 360.

‘running gear’ of a wagon. This was kept by the plaintiff for some six months, other materials being added by him meantime. He now bargained with the debtor to finish the wagon, and turned over the materials for the purpose. The completed wagon was levied upon by the defendant in the debtor’s shop. It was held that the facts did not show fraud as a matter of law, in a state in which retaining possession makes a case of fraud per se.¹

§ 3. EXCEPTIONS: CHANGE OF POSSESSION DISPENSED WITH.

There are certain exceptions to the requirement of a change of possession; and now it must be understood that by ‘change of possession’ we do not mean ‘delivery’ merely, but all the concomitants thereof above considered, which go to make up what the law means by ‘change of possession.’ There may be cases, as we have seen, in which delivery in the ordinary sense of transferring from hand to hand or the like is impracticable in which there must still be a change of possession. The exceptions now intended are sweeping. First of these is the exception everywhere made, by statute, in regard to mortgages of chattels.

The legislation of New York, which has become the legislation of many other states, has already been referred to. Assignments of goods by way of mortgage, or upon condition, are void against creditors, unless made in good faith and without intent to defraud;² and mortgages of goods not accompanied by delivery and change of possession are void against creditors and purchasers, unless the mortgage or a copy is duly filed for registration.³ There is a corresponding provision touching the mortgage of chattels in the legislation of Massachusetts, which reappears in other states. It is pro-

¹ *Dunlap v. Bournonville*, 26 Penn. N. Y. 139, that the mortgagor may be left in possession and employed as agent of the mortgagee.
St. 72; *McMarlan v. English*, 74 Penn. St. 296.

² See *Preston v. Southwick*, 115 ³ Ante, pp. 36, 37.

vided, of mortgages of personal property, that unless the mortgage is recorded within fifteen days after its date, or unless the property mortgaged is delivered to and retained by the mortgagee, the mortgage shall not be valid against any person other than the parties thereto. But no recording is necessary to the validity of a mortgage or other instrument relating to a ship or vessel, or to the validity of a mortgage of goods at sea or abroad, if the mortgagee takes possession of such goods as soon as may be after they come within the state.¹

The effect of these provisions is to remove the necessity of delivery of possession in transactions falling within them; that is, the creditor cannot rest his case upon the possession of his debtor in cases arising under these statutes, recording being a substitute for delivery.² But in the matter of transactions not within these or other statutes, as where the mortgage is not recorded,³ the case is covered by the statute of Elizabeth as interpreted or construed by the courts.⁴ The due recording of a mortgage of personalty may then be set down as the first, as it is the most important, kind of transaction in which retaining possession does not make a case for the creditor.

The provisions of statute however refer to retaining possession of the goods until default, unless indeed possession is afterwards kept against the mortgagee's will.⁵ Within a reasonable time after default, the mortgagee should take possession; otherwise the retaining will be either absolutely⁶ or

¹ There is a like statute in Connecticut concerning mortgages of household furniture. *Rood v. Welch*, 28 Conn. 157.

² *Robinson v. Elliott*, 22 Wall. 513. On the other hand the recording of the mortgage does not validate an invalid transaction even presumptively. *Ib.*; ante, p. 243. See *McFadden v. Fritz*, 90 Ind. 590; *Singer v. Sheldon*, 56 Iowa, 354; ante, p. 242, note.

³ *Clow v. Woods*, 5 Serg. & R. 275; *Jordan v. Lendrum*, 55 Iowa, 478.

⁴ *Rood v. Welch*, 28 Conn. 157. So of the mortgagor's continued retaining of possession of the mortgaged property for unreasonable length of time after default. *Sandlin v. Anderson*, 76 Ala. 403, and cases in note 6.

⁵ *Simms v. McKee*, 25 Iowa, 341.

⁶ *Sandlin v. Anderson*, supra; *Reed v. Eames*, 19 Ill. 594; *Cass v. Perkins*,

presumptively¹ fraudulent, according to the local law pertaining to ordinary cases. What constitutes reasonable time will depend upon the circumstances of each particular case.² It is held in Illinois that a delay of two days after default, where the parties live in the same town or county, and there is no obstacle to prevent action, is unreasonable.³

Again the rule in regard to the effect of retaining possession has been held not to apply to judicial sales, on the ground that the sale is not the act of the party who retains possession, but the act of the law. The fact that the owner retains possession after the sale cannot, it is considered, show that a sale by the sovereign power was made with intent to defraud. And further there is a rule that a judicial sale, being conducted by a sworn officer of court, is to be deemed fair until proved otherwise; touching which such retaining of possession is irrelevant.⁴ Permission to use and enjoy the property sold is in such a case a mere act of benevolence, not amounting to a gift of the property or sufficient to revest it in the late owner.⁵ The fact does not even constitute evidence of fraud.⁶ But the contrary is held in New York, under the statute, which is positive and makes no exceptions;⁷ and the contrary is generally held true of property taken on execution and then left, without explanation, in the hands of the debtor.⁸

23 Ill. 382; *Reese v. Mitchell*, 41 Ill. 365; *Dunlap v. Epler*, 88 Ill. 82. See *Summer v. McKee*, 89 Ill. 127.

¹ *Shurtleff v. Willard*, 19 Pick. 202 (it seems); *Feurt v. Rowell*, 62 Mo. 524 (it seems).

² *Reed v. Eames*, supra; *Reese v. Mitchell*, supra; *Arnold v. Stock*, 81 Ill. 407.

³ *Reese v. Mitchell*, supra.

⁴ *Mead v. Conror*, 113 Penn. St. 220; *Moynes v. Atwater*, 88 Penn. St. 496; *Craig's Appeal*, 77 Penn. St. 448. See *Rohland v. Rooke*, 127 Penn. St. 139.

⁵ *Moynes v. Atwater*, supra; *Walter v. Gernant*, 13 Penn. St. 515.

⁶ *Ib.*

⁷ *Stinson v. Wrigley*, 86 N. Y. 332. See also *Davis v. Drew*, 58 Cal. 152; *Humphreys v. Harkey*, 56 Cal. 283.

⁸ *Davis v. Drew*, 58 Cal. 152; *Humphreys v. Harkey*, 56 Cal. 283; *West v. Skip*, 1 Ves. 239, 245, *Lord Hardwicke*; *Lovick v. Crowder*, 8 Barn. & C. 132, 136; *Christopherson v. Burton*, 3 Ex. 160; *Imray v. Magnay*, 11 Mees. & W. 267; *Remmett v. Lawrence*, 15 Q. B. 1004. See further chapter 16, near end, and chapter 26, 1.

In the case of a general conveyance of real and personal property, the personal property being upon the land, there need be no special change of possession of the latter apart from what constitutes a sufficient transfer of the land. It is declared that the sufficient transfer of the land, in such a case, is notice to all of a change of ownership; and the publicity of the change in respect of the primary subject of the conveyance affects equally 'the personalty, the mere incident, remaining in visible connection therewith.'¹ Hence if the vendor is seen on the premises, making use of the personalty, after the sale, he is to be taken as merely acting for the owner;² and this, it is held, though the conveyance was by husband to wife.³

¹ *Elmer v. Welch*, 47 Conn. 58; *Gilligan v. Lord*, 51 Conn. 562; *Steward v. Lombe*, 1 Brod. & B. 506. *Comp. Bernal v. Hovious*, 17 Cal. 541, sale of growing crops to fellow-ranchman and employee on the same ranch; *Vischer v. Webster*, 13 Cal. 58. See also *Mather v. Fraser*, 2 Kay & J. 536.

² In *Elmer v. Welch*, *supra*, the court says: 'The law did not demand either a permanent or temporary removal of the latter [personalty]. Whoever saw it thereafter in the defendant's possession and use, upon the realty known to be his, became chargeable with the knowledge that he held and used both by the same right; and as all persons had knowledge [notice] that Smith neither owned nor occupied the realty, whoever saw him thereon in charge of the personalty was bound to presume him to be the servant of the defendant rather than the owner of the property.' See also *Cole v. Varner*, 31 Ala. 244.

³ In *Gilligan v. Lord*, *supra*, where there had been a conveyance of the kind to the grantor's wife, the court after quoting the passage in the last note, says: 'It is true that it is here

found that the plaintiff and her husband continued to occupy the real estate as a homestead until after the property was attached; but the occupancy of the wife was none the less an occupancy because she shared it with her husband. But it is difficult to see how the wife could well have kept a possession and use of the property distinct from her husband. It was necessarily on the premises occupied by them both, and naturally and almost necessarily under his care and subject to his use. Considering the nature of the property, it is difficult to see how she could have kept it under her exclusive and visible control, except by withdrawing it wholly from family use, which could hardly be required. . . . In this case, with the notice of the wife's general ownership furnished by the recorded deed, there would be such a presumption of her ownership of the personal property on the premises as would reasonably lead any person observing the husband's use of the property to conclude that he was using it as hers or in the exercise of his rights as husband and not as exclusively his

Possession therefore 'according to the instrument,' a common expression of the books,¹ and often used to indicate a good possession, is not necessarily sufficient. This was one of the serious matters considered in a case² already stated; in which there had been such possession. 'Possession according to the instrument' had been laid down by Lord Holt to be valid.³ That great judge had held that wherever, by the terms of a contract, it appeared that possession was not to follow immediately upon the transfer of title, the case was not within the statute of Elizabeth. This was now considered too broad. One of the greatest judges of Pennsylvania, Mr. Justice Gibson, observed that the contract and the evidence of it were secret matters; what would it avail that a person intending to cover up his property by a sham sale had declared in the contract that he was to retain indefinite possession? The retention of possession should not only be part of the contract, it should appear to be for a purpose fair and honest and necessary, or at least essentially conducive to some fair object the parties had in view and constituting the motive to the contract. 'It is necessary, not only that appearance should agree with the real state of things, but also that the real state of things should be honest and consistent with public policy, and that it afford no unnecessary facility to deception.' Convenience of the parties was not a ground for excusing delivery; there should be some act looking to delivery.⁴ Where however the provision of the instru-

own.' See also *Cole v. Varner*, 31 Ala. 244.

¹ See e. g. *Rozier v. Williams*, 92 Ill. 187; *Hempstead v. Johnston*, 18 Ark. 123; *Clow v. Woods*, 5 Serg. & R. 275; *Hopkins v. Scott*, 20 Ala. 179; *Meggot v. Mills*, 1 Ld. Raym. 286.

² *Clow v. Woods*, *supra*.

³ *Meggot v. Mills*, 1 Ld. Raym. 286. See also *Martindale v. Booth*, 3 Barn. & Ad. 498; *Alton v. Harrison*, L. R. 4

Ch. 622. And the law appears to be so in some of our states. 'See *Rozier v. Williams*, 92 Ill. 187, 189; *Thompson v. Yeck*, 21 Ill. 73; *Thornton v. Davenport*, 1 Scam. 297; *Clayton v. Brown*, 17 Ga. 217; *Hempstead v. Johnston*, 18 Ark. 123; *Hopkins v. Scott*, 20 Ala. 179.

⁴ *Gibson, J.*: 'All the late cases have gone on the ground that the want of delivery was absolutely necessary to

ment is proper, there is more reason for requiring conformity with it; that is the case more commonly presented. The claim of rights inconsistent with a deed may be most deceptive.¹

We have seen that a chattel may be held by a person in bailment without being liable for that person's debts. It should follow, and in point of fact it does follow, that the owner can transfer the chattel to another without disturbing the bailment; that is to say, a man may sell a chattel in the hands of a bailee without taking it out of the bailee's hands, and the buyer, if the bailee is duly notified,² may safely leave it there.³ Enough that it does not now go back into the possession of the seller;⁴ the bailee now becomes bailee of the buyer. Thus an omnibus and horses, kept in the stable of another, were bought and still kept without change in the same stable; and though the late owner was now employed as driver, it was held that if the bailee kept the horses in an open notorious manner, the sale was good against the seller's

effect some fair purpose of the parties. But I take it, where the motive of the sale is merely security to the vendee, and the owner is permitted to retain all the visible marks of ownership, for no other reason than the convenience of the parties, the contract will be void, although the reasons be stated . . . and the possession be consistent with the deed. . . . Lord Holt went on the ground that the possession was according to the terms of the agreement and the contract fair; and so indeed it was, as between the parties, but it was deceptive as to the public.'

See also *Gaylor v. Harding*, 37 Conn. 508. In this case it is declared that 'it can make no difference whether the consent of the mortgagee be, as in the present case, expressed in the writing

or be tacit and implied as in *Swift v. Thompson*, 9 Conn. 63. Comp. chapter 10, on mortgages of merchandise, especially near the end of the chapter.

¹ See e. g. *Lukins v. Aird*, 6 Wall. 78. But comp. with that case *Tibbals v. Jacobs*, 31 Conn. 428.

² *Buhl Iron Works v. Tenton*, 67 Mich. 623, 629, 630; *Carpenter v. Graham*, 42 Mich. 191. The assent of the bailee need not be proved. See the first of these cases and at p. 631; *Hodges v. Hurd*, 47 Ill. 363.

³ *Linton v. Butz*, 7 Barr. 89; *Worman v. Kramer*, 73 Penn. 'St. 378; *Williams v. Leech*, 56 Cal. 330; *Stowe v. Taft*, 58 N. H. 445. See also *Haynes v. Leppig*, 40 Mich. 602, as bearing upon this subject.

⁴ *Linton v. Butz*, *supra*; *Grum v. Barney*, 55 Cal. 254.

creditors.¹ The reason is plain ; the bailee did not appear as owner before the sale, and he does not appear any more such afterwards.

It is fair inference from the statement that in such cases the property should not at once go back into the possession of the seller, that the seller cannot be made immediately the bailee of the buyer without subjecting the transaction to be treated, if that is all there is of the case, as in fraud of creditors ; and that too appears to be within the very language of the law, to wit, that the change of possession should be continuous, for it is to be remembered that possession in the present subject properly means *manifest* possession. The holding by the seller as bailee could not in principle be treated as possession by the buyer, as the holding of a third person might.²

The statute could often be set at naught if the buyer could immediately make the seller his bailee ; it is going as far as the law can properly allow when it is declared that the seller

¹ *Worman v. Kramer*, *supra*. 'Suppose that A keeps a livery-stable, and sells a horse or pledges a horse to B, and delivers the possession to B accordingly ; may not B keep the horse at the same stable afterwards, without losing his possession ? From and after the delivery A acts in character of livery-stable keeper, not in character of owner. Suppose that A, having so pledged and given possession of the horse, should go and live with B as a coachman, and B should send him with the horse to be shod on his account by the blacksmith ; could it be maintained that B had waived or lost the possession of his pledge ? Clearly not. The possession would continue to be kept by the servant for the account of the master.' Putnam, J. in *Macomber v. Parker*, 14 Pick. 497. See also *Ziegler v. Handrick*, 106 Penn. St. 87 ; *Craw-*

ford v. Davis, 99 Penn. St. 576 ; *Dunlap v. Bournonville*, 26 Penn. St. 72.

² *Young v. McClure*, 2 Watts & S. 147 ; *Garman v. Cooper*, 72 Penn. St. 32 ; ante, p. 345 ; *Chamberlain v. Stern*, 11 Nev. 268 ; *Gray v. Sullivan*, 10 Nev. 416. See *Grum v. Barney*, 55 Cal. 254 ; *Regli v. McClure*, 47 Cal. 612 ; *Linton v. Butz*, 7 Barr, 89. Comp. what is said ante, pp. 330-332, on bailment. In *Grum v. Barney* the buyer had been holding as servant, and no sufficient change had been manifested. See also *Regli v. McClure*. If the buyer was already in full possession in the manner of ownership, it will not be necessary to go through any ceremony to make a case of change of ownership further than what would be required for a good sale as between the parties. See *Dowdell v. Wilcox*, 64 Iowa, 721.

may be taken into the employment of the buyer and so have the management of the property. But there is some authority for the doctrine that the seller may directly be made the buyer's bailee.¹ Thus a horse and carriage, sold by A to his brother, were kept in the stable in which A lived, after as well as before the sale, but under a new arrangement made after the sale; and this was held valid against creditors of the seller.² And it has been held that after a sale and delivery of a chattel, the same may be directly loaned to the seller.³ But unless there was some considerable interval between the sale and the bailment, during which time the buyer has been exercising open and sufficient ownership, it may be seriously doubted whether the transaction should not be treated (*prima facie* or absolutely, according to the local law) as a fraud upon the vendor's creditors. This doubt however rests upon the assumption that the holding of the bailee-seller is, to appearances, in the way of ownership. The mere fact that the property is in his hands would not make such a case,⁴ for he might then and there disclaim and disprove any such holding, or there might be some sufficient indication such as a sign over a shop or stable door showing the facts, or the very nature of the business in connection with which the chattel is found might disclose the true state of things and make the holding proper.⁵

Pursuing this subject a step further brings us to a difficulty. Can one member of a household buy, or accept a gift of, a chattel from another member of that household, the chattel being in the actual keeping of the seller or giver, and leave the chattel on the premises? It has sometimes been considered that this would be contrary to the statutes against fraud-

¹ *Ziegler v. Handrick*, 106 Penn. St.

87; *Deere v. Needles*, 65 Iowa, 101.

See also *Stone v. Spencer*, 77 Mo. 356; *Lake v. Morris*, 30 Conn. 201.

² *Ziegler v. Handrick*, 106 Penn. St. 87.

³ *Deere v. Needles*, *supra*.

⁴ *Towne v. Rice*, 59 N. H. 412, *ante*, p. 345, note; *Gray v. Sullivan*, 10 Nev. 416.

⁵ See cases just cited.

ulent conveyances,¹ and taking them strictly that would appear to be true. But there are strong authorities against this interpretation of the law.² Must a son, in order to keep a horse which his father has given to him, leave his father's house, or perchance turn his father out of doors?³ Must a wife to whom her husband has given a painting, bought at a great price, hang the painting in the servant's room, or leave her husband, to keep it from some creditor of his?⁴ Some authorities⁵ would, against what appears to be the better view,⁶ put the claimant in such a case to stronger tests of the purchase or gift, than is required in other cases; but even these authorities admit the right of the transferee to hold the property. The question, it will be observed, turns entirely upon the circumstance that the transaction is between members of the same household, and assumes that the sale or gift, apart from the question of change of possession, was valid.

Doubtless the relation of the parties should be ground for most careful scrutiny; but when the relation, with its facilities for wrongdoing, is put into the balances with the other evidence offered by the creditor, against the evidence thrown into the other side, there should be only a question of the weight of evidence. It is too late now to urge that it were better that all the property of the household apparently in the hands of the debtor should be liable for his debts. Gifts

¹ *McAfee v. Busby*, 69 Iowa, 328, where a man gave a carriage, a sleigh, and a billiard-table to his wife, which remained in the family in use by all as before. But in *Dowdell v. Wilcox*, 64 Iowa, 721, a man sold property to his wife, which was already in her possession, and it was held that no recording was necessary. See also *Pierson v. Heisey*, 19 Iowa, 114, gift to daughter, of a piano still kept in the giver's house, held valid.

² *Davis v. Zimmerman*, 40 Mich. 24; *Gilligan v. Lord*, 51 Conn. 562; *Danley v. Rector*, 5 Eng. (Ark.) 211. But the last named is a rather extreme case.

³ *McVicker v. May*, 3 Barr, 224, *supra*, pp. 341, 342.

⁴ *Davis v. Zimmerman*, 40 Mich. 24.

⁵ *Gamber v. Gamber*, 18 Penn. St. 363.

⁶ *Davis v. Zimmerman*, *supra*; *ante*, pp. 187, 193, notes.

or sales by others to the debtor's wife or son are, unless the wife or son is at fault, safe from the debts of the husband and father, notwithstanding that the property may appear to be in his hands; then why not gifts or sales by *him* to the wife or son? If exceptions to the statutes in regard to change of possession are admissible at all, here seems to be a proper case.¹

§ 4. HOW POSSESSION IS REGARDED.

In most of the states there is a marked distinction between the case of a trust or reservation in favor of the debtor out of property by him turned over to his creditors and the case of a retention of property by a vendor. Thus while in New York and in most of the states the first would make a case of fraud absolute, the second would make only presumptive evidence of fraud.² In some states however the two cases

¹ In *Davis v. Zimmerman*, *supra*, in which a horse, buggy, robes, and other articles had been given by a husband to his wife, Mr. Justice Cooley said: 'The donor and donee are husband and wife, living together at a public hotel. Must she separate from him in order to be competent to receive a gift from him? If he gives her a picture or an article of furniture, must she procure it to be kept by some one else instead of placing it in her own apartments? Some Pennsylvania cases are cited, in which the court has used some strong language respecting the evidence which should be required to make out a gift from husband to wife. Chief Justice Black said in *Gamber v. Gamber*, 18 Penn. St. 363, 366, that a married woman claiming property must show her right "by evidence which does not admit of a reasonable doubt." This is a very strong statement, and lays down a much more severe and stringent rule than is applied to other persons. In

this state no such distinction is recognized.' But the relation, the learned judge adds, is a circumstance to be carefully weighed.

In another place (*ante*, p. 187) it has been pointed out that the rule referred to by Chief Justice Black properly applies to cases in which a wife seeks to raise a trust in her favor in property the title to which stands in the name of her husband; in which case indeed the rule is not peculiar at all to the case of a wife.

² *Preston v. Southwick*, 115 N. Y. 139; *Clute v. Newkirk*, 46 N. Y. 684; *ante*, p. 36; *Warner v. Norton*, 20 How. 448; *McDonough v. Prescott*, 62 N. H. 600; *Stowe v. Taft*, 58 N. H. 445; *Wilson v. Sullivan*, *ib.* 260; *Mead v. Gardiner*, 13 R. I. 257; *Pan-coast v. Miller*, 29 N. J. 250; *Davis v. Turner*, 4 Gratt. 423; *Bindley v. Martin*, 28 W. Va. 773; *Millard v. Hall*, 24 Ala. 209; *Thompkins v. Nichols*, 53 Ala. 197; *Crawford v. Kirksey*, 55

appear to stand upon the same footing; in Pennsylvania, Connecticut, Illinois, and some other states, retention of possession equally with a trust or reservation, making conclusive evidence of fraud;¹ in Massachusetts neither of them making conclusive evidence where the matter is capable of any other interpretation. And in Virginia the rule of law is more favorable to trusts for the debtor than to retention of possession of property sold; the former being often upheld,² and the latter being treated as *prima facie* evidence of fraud.³

There appears to be sufficient ground for a distinction between the two cases. The matter of trusts or reservations commonly appears in preferential transactions between debtor

Ala. 282; *Guice v. Sanders*, 21 La. An. 463; *Thorne v. First National Bank*, 37 Ohio St. 254, 259; *Molitor v. Robinson*, 40 Mich. 200; *Norwegian Plow Co. v. Hanthorn*, 71 Wis. 529, 537; *Powell v. Stickney*, 88 Ind. 310; *Rose v. Colter*, 76 Ind. 590; *Carney v. Carney*, 7 Baxt. 284; *George v. Norris*, 23 Ark. 121, 128; *Phillips v. Reitz*, 16 Kans. 396; *Molm v. Barton*, 27 Minn. 530; *Hagany v. Herbert*, 3 Houst. 628; *Goodwyn v. Goodwyn*, 20 Ga. 600; *Little Rock Ry. Co. v. Page*, 35 Ark. 304; *Hempstead v. Johnston*, 18 Ark. 123; *Densmore v. Tomer*, 14 Neb. 392; *s. c.* 11 Neb. 118; *Miller v. Morgan*, 11 Neb. 121; *Wake v. Griffin*, 9 Neb. 47; *Ward v. Gould*, 4 Pick. 104; *Ayer v. Bartlett*, 6 Pick. 71; *Briggs v. Parkman*, 2 Met. 258.

¹ *Thompson v. Paret*, 94 Penn. St. 275; *Worman v. Kramer*, 73 Penn. St. 378; *Miller v. Garman*, 69 Penn. St. 134; *Milne v. Henry*, 40 Penn. St. 352; *Young v. McClure*, 2 Watts & S. 147 ('It is an inflexible rule which makes it fraud *per se* if the possession does not follow as well as accompany the transfer'); *Bonner v. Shaw*, 29 Penn. St. 288; *Clow v. Woods*, 5 Serg. & R.

275; *Webster v. Peck*, 31 Conn. 495; *Capron v. Porter*, 48 Conn. 383, 388 ('The reason of the rule is that . . . the continued possession is to be regarded as a sure indicium of continued ownership, and that the possessor would obtain . . . a false credit'); *Weeks v. Prescott*, 53 Vt. 57; *Rozier v. Williams*, 92 Ill. 187 (retaining possession is fraudulent *per se* unless 'consistent with the deed'); *Johnson v. Holloway*, 82 Ill. 334; *Richardson v. Yardin*, 88 Ill. 124; *Thompson v. Yeck*, 21 Ill. 73; *Thornton v. Davenport*, 1 Scam. 297; *Wright v. McCormick*, 67 Mo. 426; *Burgert v. Borchert*, 59 Mo. 80; *Claffin v. Rosenberg*, 42 Mo. 439; *Sutton v. Ballou*, 46 Iowa, 517; *Boothby v. Brown*, 40 Iowa, 104, 105; *Stevens v. Irwin*, 15 Cal. 503.

In Pennsylvania retaining possession is fraudulent *per se* only as to existing creditors; as to subsequent creditors 'fraud in fact' must be proved. *Ditman v. Raule*, 124 Penn. 225; *Buckley v. Duff*, 114 Penn. St. 596.

² *Ante*, pp. 269, 270.

³ *Curd v. Miller*, 7 Gratt. 85; *Davis v. Turner*, 4 Gratt. 422; *Bonner v. Shaw*, 29 Penn. St. 288 (Virginia law).

and creditor; and preferences, as we have seen, are not favored by the courts,¹ while trusts or reservations in favor of the debtor plainly indicate a design on his part to hinder his creditors, whether with a view to his own benefit or to the substitution of some method of his own for paying his debts in place of the method allowed the creditor by law. The two facts fully justify the rule declaring transactions of the kind a fraud as matter of law.

In regard to retaining possession the case is materially different. The question of possession commonly arises in cases of sales between strangers; in such cases there is nothing of preference, and while there is something of benefit reserved out of the property in the seller's retaining possession, as there is in the case of a trust or reservation, that fact is of slight consequence and scarcely enters into the case at all. The difference is between dealing with a stranger and with a particular creditor favored above others equally entitled to satisfaction. Indeed it is questionable whether, in the case of a sale of goods to a *stranger*, the fact that the debtor had reserved, if openly, a benefit would defeat the sale, where possession was delivered.² It is the possession retained, rather than the benefit to be derived from it, that affects the transaction; and that can hardly be considered as serious a thing as a trust or a reservation out of property assigned for the professed benefit of creditors.

Accordingly there began to be indications long ago of a milder view of this matter of retaining possession than that taken of trusts and reservations, but the view was by no means steadily maintained. The matter was in an unsettled state in England for a long time; but finally, after much conflict of authority, it became the established rule that retaining possession

¹ Ante, p. 314, note.

² Comp. *Cadogan v. Kennett*, 2 Cowp. 432, in which however possession was retained by the vendor; but the sale was upheld, not being made to a creditor, notwithstanding trust and possession. It is difficult to believe that the result could have been the same had the transaction been a preference of some creditor.

was only *prima facie* evidence of intent to defraud.¹ Into the same discussion our courts were drawn, and similar conflicts of authority resulted; and these continuing, divergent rules of law have become established in different states, as we have seen.

Under the New York legislation stated on a preceding page,² the facts relating to possession must, it seems, be given to the jury though it is conceded that there was no real intent to defraud;³ the jury may still find the intent of the *statute*, on the facts in the case, and if there is nothing but retention of possession they must find such intent. That appears to express the more general rule, whether by statute or at common law.⁴ Under the New York statute however valid reasons need not be given for the retention of possession,⁵ while the

¹ For the earlier English cases see *Edwards v. Harben*, 2 T. R. 587, which is usually referred to as deciding that retaining possession makes a conclusive case of fraud; but in reality there was in that case, besides possession, a right of enjoyment and profit, and there were still other indications of fraud. Among the later English cases, showing that retaining possession makes only a *prima facie* case of fraud, see *Martindale v. Booth*, 3 Barn. & Ad. 498; *Lindon v. Sharp*, 6 Man. & G. 898; *Alton v. Harrison*, L. R. 4 Ch. 622. So in Ireland. *Macdona v. Swiney*, 8 Ir. C. L. 73. In *Lindon v. Sharp*, *supra*, Tindal, C. J. said: 'The modern doctrine is that it must be left to the jury to say whether the continuance in possession is fraudulent or not. It is a strong fact, but not conclusive.'

² Ante, p. 335.

³ *Blaut v. Gabler*, 77 N. Y. 461.

⁴ See cases cited, *supra*, pp. 356, 357.

⁵ The qualifying clause of the New York statute is worthy of notice. It is the 'sale or assignment,' not the retaining possession, that must be shown to

have been 'made in good faith, and without intent to defraud,' where there has been no change of possession; and the construction put upon this language is that, where the good faith and want of fraudulent intent are shown, it makes no difference that no valid reason for not transferring possession is shown. *Hanford v. Artcher*, 4 Hill, 275, *Walworth*, Ch. dissenting; *Mitchell v. West*, 55 N. Y. 107. This might at first appear to be relaxing the very clear and satisfactory doctrine of fraud held by the New York courts; but that would probably be an incorrect conclusion. The claimant must show that the transaction was in good faith, and without intent to defraud; but this latter expression must, it seems, have the same meaning as the like expression in the general statute against fraudulent conveyances. This will appear by considering a case falling within both statutes. Suppose an assignment by an insolvent debtor for his creditors subject to an objectionable reservation and also retention of possession of the property or part of it; could the 'intent

language of the common law authorities is that the fact should be satisfactorily explained.¹

In some states it is difficult to determine from the language of the judges just what force is to be given to the retention of possession. In Massachusetts for example does retention of possession make a presumption of intent to defraud, or does it make only evidence thereof? The difference in a particular case may be telling, a presumption, it need hardly be said, can be overturned only by overturning the evidence upon which it rests,—if the evidence is true, the presumption follows and must prevail unless met by matter *ab extra*; ordinary evidence on the other hand, though not rejected, may be weighed and taken for what it is worth.²

The language of the Massachusetts cases leaves the matter in doubt. The only thing quite clear is that retaining possession does not in that state make a case of fraud as matter of law.³ After that we find the court saying in one case that possession is *prima facie*, i. e. presumptive, evidence of fraud,⁴ in another that it is evidence of fraud,⁵ and nowhere speaking

to defraud' in the first case exclude all personal motive, as it does, and not exclude personal motive in the second?

The qualifying clause in the statute concerning the sale or assignment of goods appears merely to require that the sale or assignment shall be real, and not fictitious; then it is 'in good faith and without intent to defraud,' and the fact that possession is not transferred is immaterial. A 'real' sale must be a legal sale. It is then a question of the meaning and legal effect of the facts, not a question of the bearing of those facts upon the motive of the vendor.

¹ See Massachusetts cases, *infra*, p. 361, note.

² As Professor Thayer has shown, in an invaluable article on Presumptions, a presumption is a rule of law, and that too as well when it is *prima facie* as

when it is conclusive. Harvard Law Rev. November, 1889, p. 141. Indeed the former is as conclusive and binding as the latter in the absence of evidence overturning it. Presumptions are no part of the *law* of evidence, though it is right to speak of 'presumptive evidence.' See the article cited.

³ Gould v. Ward, 4 Pick. 104; Ayer v. Bartlett, 6 Pick. 71; Baxter v. Wheeler, 9 Pick. 21; Fletcher v. Willard, 14 Pick. 464; Allen v. Wheeler, 4 Gray, 123. See also Isler v. Foy, 66 N. Car. 547.

⁴ Briggs v. Parkman, 2 Met. 258, *infra*. See Slater v. Dudley, 18 Pick. 373, agreement for support. But see Towne v. Fiske, 127 Mass. 125, 132.

⁵ Shurtleff v. Willard, 19 Pick. 202; Morton, J.: 'The possession of the vendor, whether the sale be absolute or

with precision upon the question. Sometimes the language of the court in one and the same case is equivocal. Thus Mr. Justice Wilde has said that 'the possession of the vendor after the sale is not a *conclusive badge* of fraud. . . . It is *evidence* of fraud, and not fraud per se.'¹ In another case the same learned judge says that such a possession 'is only a badge or presumptive evidence of fraud, which it is proper to submit to a jury,' as being explainable.² But on the whole the rule in Massachusetts is believed to be, that retaining possession raises a prima facie presumption of fraud in cases not affected by statute.³

§ 5. RETAINING POSSESSION OF LAND.

What has been said in the preceding part of this chapter relates to personal property. Retaining possession of land after it has been sold is a different thing altogether, according to the current of authority. Whether under a system of transfer of title to land by delivery of, and consequently holding by, the title deeds, or by delivery of, and consequently holding by, the particular deed followed by registration under registration laws, it has never been held that possession of land, whatever significance it may have, is the significant mark of ownership, as is possession of a chattel. For the purposes of a possessory action by the occupant, possession indeed makes a presumptive case;⁴ but creditors and pur-

conditional, is only evidence of fraud.' So the Court in *Fletcher v. Willard*, 14 Pick. 464: 'Permitting the chattels to continue in the possession of the vendor was not per se fraud as against creditors, but merely evidence of fraud.' In *Baxter v. Wheeler*, 9 Pick. 21, of possession retained of land: 'Such possession may be evidence of fraud.' See also *Gould v. Ward*, 4 Pick. 104; *Brooks v. Powers*, 15 Mass. 244 ('evidence of the strongest kind'); *Allen v. Wheeler*, 4 Gray, 128.

¹ *Wheeler v. Train*, 3 Pick. 255.

² *Briggs v. Parkman*, 2 Met. 258.

³ It is held in Indiana that the presumption arising from retention of possession is repelled by proof that the buyer has paid the purchase-money and that the seller is solvent. *Rose v. Colter*, 76 Ind. 590.

⁴ *Jones v. Williams*, 2 Mees. & W. 326, 331, Parke, B.; *Lord Advocate v. Blantyre*, 4 App. Cas. 770, 791, Lord Blackburn; *Pollock & Wright, Possession*, 32.

chasers are accustomed and are bound to look to the possession of the title deeds, or to the pages of the registry.¹

The possession of land is only notice of some claim of the possessor, putting creditors and purchasers upon inquiry,² and not justifying in itself, apart from special statute,³ a levy upon the land as even presumptively the property of the possessor. Such is the clear weight of authority;⁴ though in a few in-

¹ *Lukins v. Aird*, 6 Wall. 78; *Ray v. McPherson*, 11 Neb. 197; *Tibbals v. Jacobs*, 31 Conn. 428, *infra*, p. 363, note.

² Vol. 1, pp. 390-393.

³ The statutes of some states, perhaps of most states, permit a creditor to attach property as that of the grantor, if the deed has not been recorded. See e. g. *Tibbals v. Jacobs*, 31 Conn. 428, 431, *Hinman*, C. J. That however is not because of the grantor's possession, but because his deed is not recorded. In some states failure to record a deed will not give creditors a right to disregard it if it was not fraudulently withheld. *McDonnell v. Mobile Bank*, 87 Ala. 736. See *infra*, p. 365.

⁴ *Phettiplace v. Sayles*, 4 Mason, 312, 322, *Story*, J.; *Avery v. Street*, 6 Watts, 247, 249; *Ludwig v. Highley*, 5 Barr, 132; *Allentown Bank v. Beck*, 49 Penn. St. 394; *Every v. Egerton*, 7 Wend. 260; *Clute v. Newkirk*, 46 N. Y. 684; *Bank of United States v. Housman*, 6 Paige, 526; *Merrill v. Locke*, 41 N. H. 486, 489; *Tibbals v. Jacobs*, 31 Conn. 428; *Fuller v. Brewster*, 53 Md. 363; *Tompkins v. Nichols*, 53 Ala. 197; *Suiter v. Turner*, 10 Iowa, 517, 523; *Apperson v. Burgett*, 33 Ark. 328, 337; *Steward v. Thomas*, 35 Mo. 202; *Cadogan v. Kennett*, 2 Cowp. 431, leaseholds; *Steward v. Lombe*, 1 Brod. & B. 506, 511; *Ryall v. Rolle*, 1 Atk. 165, 168; s. c. 1 Ves. 348, 360. See also *Chase v. Horton*, 143 Mass. 118, that retaining possession cannot be treated as conclusive of fraud. Noth-

ing of course is more common than for a mortgagor of land to retain possession; this was never supposed to indicate fraud. So in deeds of trust, of which *Coker v. Shropshire*, 59 Ala. 542, is an example.

In *Avery v. Street*, 6 Watts, 247, 249, *Gibson*, C. J. says: 'It is well established that, when land is conveyed, want of correspondent possession is less evincive of fraud than where a chattel is sold, because the title to the former is evidenced by possession not of the thing but of the title deeds, which, like manual occupation in the case of a chattel, is the criterion.'

Bell, J. in *Ludwig v. Highley*, 5 Barr, 132, 141: 'The most usual mode by which real property is enjoyed is by permitting others to occupy it; and it has never been thought, in the absence of actual fraud, that, so far as third persons were concerned, it makes any difference whether the occupancy be by virtue of a demise for years, or under an absolute conveyance, coupled with a secret bona fide trust. To hold otherwise would be materially to interfere with, in a great variety of cases, this species of equitable estate, which our laws distinctly recognize. Our books furnish numerous instances in which the possession of trust property remained in the trustee, and yet, until now, it has never been claimed that such possession subjected the land to the burden of his debts. In the case of personal chattels possession is said

stances courts have been led to suppose that, where a man is found in possession of and exercising acts of ownership over land which he has granted to another by an absolute deed, there is presumptively a secret trust in his favor, and hence that the conveyance is a badge of fraud, or is *prima facie*, or presumptively, fraudulent.¹ The case is one in which the apparent analogy in the matter of the sale of goods has misled. There is however strong authority for the position that a secret trust, as e. g. by oral contemporaneous agreement, in favor of the grantor of land by a deed absolute on its face, and duly recorded, is a fraud upon the grantor's creditors,²

to be the only indicium of ownership to a stranger, but this cannot be said of hereditaments.'

Agnew, J. in *Allentown Bank v. Beck*, 49 Penn. St. 394, 409: 'The main ground urged by defendant was that the rule governing sales of personal property should apply to real estate. But the title to real property is governed by the conveyance as its chief index, and not by the possession.'

Wright, J. in *Suiter v. Turner*, 10 Iowa, 517, 523: 'The doctrine of *Twyne's Case* . . . is applicable to sales of chattels, and we do not understand that any of the cases go so far as to apply the same rule to the sale of realty. . . . In this country, while possession of land may be treated for some purposes and is regarded as the lowest evidence of title, yet the public look not to the possession but to the proper records to obtain proofs of title to such property. The creditor does this, so does the subsequent purchaser,' etc. And the learned judge accordingly declares that retaining possession of land sold is not even presumptive evidence of title.

Brickell, C. J. in *Tompkins v. Nichols*, 53 Ala. 197: 'The retention of the possession of land by the vendor, after he has conveyed the same and his con-

veyance has been duly recorded, does not raise even a presumption that his sale was fraudulent.' But see *Cooper v. Davison*, 86 Ala. 367.

Hinman, C. J. in *Tibbals v. Jacobs*, 31 Conn. 428: 'The rule of law in respect to the retention of personal property . . . after a sale has never been applied to real estate. And where deeds are recorded, as with us, no good reason can be given for so stringent a rule.' On the facts in this case however the actual decision may be doubted. *Comp. Lukins v. Aird*, 6 Wall. 78; ante, p. 211, note.

¹ *Neal v. Gregory*, 19 Fla. 356, 368 ('a badge of fraud'); *Smith v. McDonald*, 25 Ga. 377 (same); *Perkins v. Patten*, 10 Ga. 241, 249 (*prima facie* evidence of fraud; a circumstance going to show a secret trust for the grantor); *Collins v. Taggart*, 57 Ga. 355; *Cooper v. Davison*, 86 Ala. 367 (in which the court appears to have overlooked its decision in *Tompkins v. Nichols*, supra); *Bank of United States v. Housman*, 6 Paige, 526, *infra*, p. 365, note; see also *Case v. Sawtelle*, 11 Neb. 51. Further see *Carter v. Happel*, 49 Ala. 539; *Zimmer v. Miller*, 64 Md. 296.

² *Lukins v. Aird*, 6 Wall. 78; *Plimp-*

but there is some authority the other way also.¹ This however is a different thing from mere retaining possession after sale of the land, though by deed absolute.

A special example may be given, for the ordinary case of retaining possession of land is too obvious to require illustration: A, formerly owner of a piece of land, and now trustee of the legal title of the same for B, and in possession, after a time conveys the title to B, who does not have the same recorded at once. Shortly after making the conveyance A makes an assignment of all his estate for the benefit of creditors, who accept accordingly; six months afterwards B has his deed recorded. A has been exercising acts of ownership over the land, all the time, and the accepting creditors have had no notice of B's claim and title. The land is not for these reasons subject to their demands, and did not pass by the assignment.²

Another example: Mother-in-law and son-in-law live together upon a piece of land, which the former has conveyed to the latter by deed, and the deed is duly recorded. The possession is to be referred to the legal title; the appearance of possession by the grantor does not raise any presumption that the conveyance was fraudulent.³ The rule in regard to mixed or concurrent possession of chattels therefore has no more application to the present subject than has exclusive possession. Retaining possession after a lease of lands, for term of years, appears to be another example of the main rule; creditors cannot, it seems, treat the lease as fraudulent for such reason,⁴ and take the tenant's crops as the property

ton v. Goodell, 143 Mass. 365; ante, p. 210.

¹ Tibbals v. Jacobs, 31 Conn. 428. See also chapter 18, § 4.

² Ludwig v. Highley, 5 Barr, 132.

³ Tompkins v. Nichols, 53 Ala. 197. See Chase v. Horton, 143 Mass. 118.

⁴ See Avery v. Street, 6 Watts, 247, 249 (which by implication sustains the

text, though the fact in regard to possession falls a little short); Ludwig v. Highley, supra, at p. 141 (where the court says that it makes no difference that the occupancy is 'by virtue of a demise for years'); Cadogan v. Kennett, 2 Cowp. 431 (Lord Mansfield: 'For that [a leasehold] does not pass by delivery.' Quære as to tenancies

of the lessor. Change of possession has however been held necessary between successive tenants.¹

The case would be different however if the creditors were induced to give the credit on the faith of the ownership of the possessor, where the real owner has neglected to put his deed on record. It is enough to bar the claim of the owner that his neglect or (to avoid any possible misunderstanding) his omission has contributed to the deception of the creditor; as e. g. where the creditor has loaned money to the person in possession, or acquired a lien upon the land, on the faith of his ownership of the particular piece of property.² This however is a case of 'holding out.'³ And again as possession of land is some indication — it is called the lowest⁴ — of ownership in the absence of registration of title of the real owner, it may be added to other facts, if there be any, which all to-

at will? In *Ryall v. Rolle*, 1 Atk. 165, 168; s. c. 1 Ves. 348, 360, it is said that the possession of land differs from possession of goods, 'for a man may be in possession of lands as a tenant at will, as a mortgagor is to the mortgagee before the condition broken.'

¹ *Bentz v. Rockey*, 69 Penn. St. 71. See also *Richardson v. Coddington*, 49 Mich. 1. And so it has been held of change of ownership of the reversion. *Loughridge v. Bowland*, 52 Miss. 546. But these matters deserve further consideration by the courts.

² *Bank of United States v. Housman*, 6 Paige, 526; *Blackman v. Preston*, 123 Ill. 381; *Sanger v. Guenther*, 73 Wis. 354; *Standard Paper Co. v. Guenther*, 67 Wis. 101; *Evans v. Laughton*, 69 Wis. 138; *Seals v. Pfeiffer*, 77 Ala. 278; *Seals v. Robinson*, 75 Ala. 363; *Coates v. Gerlach*, 44 Penn. St. 43; *Hilliard v. Cagle*, 46 Miss. 309. See *Blennerhassett v. Sherman*, 105 U. S. 100; *Hildreth v. Standa*, 2 Johns. Ch. 85; *Gill v. Griffith*, 2 Md.

Ch. 270; *Hungerford v. Earle*, 2 Vern. 261. In some states the withholding must, it seems, for some purposes be more than negligent. *McDonnell v. Mobile Bank*, 87 Ala. 786. But that should not be true in respect of a creditor who has been deceived by the appearances. *Hoagland v. Wilson*, 15 Neb. 320. Clearly it is not necessary, in order to defeat a mortgagee, that the withholding of the mortgage from record, though purposed, was with purpose to aid the mortgagor in committing an intentional fraud. *Sanger v. Guenther*, and *Standard Paper Co. v. Guenther*, supra. Further see *First National Bank v. Jaffray*, 41 Kans. 694, that withholding a deed from record is not, of itself, evidence of fraud; *Klein v. Richardson*, 64 Miss. 41.

³ See ante, p. 332; *Bigelow, Estoppel*, 560, 564, 5th ed.; *Ray v. McPherson*, 11 Neb. 197.

⁴ *Wright, J. in Suiter v. Turner*, 10 Iowa, 517, 523, quoted supra, p. 363, note.

gether may be evidence of intent to defraud ;¹ with e. g. an agreement by the grantee for the support of the grantor, whose whole estate has been conveyed, there may be a conclusive case of fraud.² Alone however retaining possession of land should have no legal significance.

¹ Apperson v. Burgett, 33 Ark. 328, Tyron v. Flourney, 80 Ala. 321 ; Oriental Bank v. Haskins, 3 Met. 332, 337 ; Steward v. Thomas, 35 Mo. 202 ; Merrill v. Locke, 41 N. H. 486, 489 ; 337.

Collins v. Taggart, 57 Ga. 355 ; Avery ² See chapter 18, § 4 ; Smith v. v. Street, 6 Watts, 247, 249. See also Conkwright, 28 Minn. 23 ; ante, chap. Fuller v. Brewster, 53 Md. 358, 363 ; 9.

CHAPTER XIV.

INTENT TO DEFRAUD CONTINUED: CREDITORS' RIGHTS.

ONE thing must be steadily kept in mind in the examination of the meaning of 'intent to hinder, delay, or defraud;' to wit, as has been repeatedly observed in the preceding chapters, that, in the administration of the laws touching conveyances in fraud of creditors, the rights of creditors and debtors respectively have often been materially affected, and, where affected at all, to the disadvantage of creditors. In a word the rights of creditors, as created either by the obligation itself or by the manner in which the law would naturally redress a failure to perform or comply with the same, — that is, the natural rights of creditors, — have in many states been seriously abridged in dealing with dispositions, by debtors, of their property. This of itself is a matter deserving some separate remark.

It would no doubt be vain to look for harmony in regard to the laws touching creditors' rights in a country composed of upwards of forty independent states, each of sovereign power in such matters; the statutes themselves vary, and are likely to vary so long as our system of federative government endures. This is a conflict of laws, rather than of authorities; and were it not for the fact of a common origin of the law, and of a general and persistent homogeneity in the whole body of the people, the laws would conflict much more than they do.

In regard to the subject under consideration in these pages it is however a noticeable fact, though easily explained, that

legislation has been more satisfactory than judicial declaration; the statutes of the states have everywhere followed the spirit and often the very model of the common prototype, presenting on the whole a body of harmonious law. The differences in regard to the extent of creditors' rights in the different states are indeed due in part to legislation, but they are due mainly to the decisions of the courts; to which a larger and more difficult undertaking was committed. This difference in the adjudication of rights may well be considered unfortunate. And then, added to this, the decisions affecting creditors' rights, in the same state, have not always been rendered upon any general theory of rights such as would create symmetry; and the consequence is that in some of the states creditors' rights in regard to fraudulent conveyances vary greatly from one branch of the subject to another, in one branch being fully maintained, in another being much relaxed. One or two instances deserve comment.

The court of New Hampshire took the lead in repudiating mortgages with power of sale by the mortgagor for his own benefit, as showing a trust obnoxious to the common law; the court itself could declare that creditors' rights had been invaded; fraud was established as matter of law. Thus creditors' rights were fully upheld. But when it came to cases of assignments for creditors, debtors were allowed to enlarge their rights, and to insert a provision requiring all creditors, who would share in the benefits offered, to release the assignor, whether the estate turned over was enough to pay the debts in full or not; generally of course it was not enough. This was as obvious an attempt against the rights of creditors (where those rights had not already been cut down by law), as was the other; it differed from the other only in that future property was reserved instead of present, and it was reserved absolutely.¹

¹ *Haven v. Richardson*, 5 N. H. 113. This was soon afterwards changed by statute. *Hurd v. Silsby*, 10 N. H. 108.

The converse of this seeming inconsistency is also to be found in some states. Thus in Maine¹ and in Michigan,² where creditors' rights have, as in Massachusetts, been much cut down in regard to mortgages with power of sale and enjoyment by the mortgagor, the rights of creditors have been maintained in the matter of assignments with provisions requiring a release.³ But that is only saying that, because the courts have cut down the rights of creditors in one particular, they are not bound to cut them down in another. Assuming however that creditors' rights have not been abridged in either particular, it is believed that each act would alike transgress those rights and thus establish the intent of the statute; that is, the provision in favor of the mortgagor would avoid the mortgage in any sound administration of the law of fraud, just as would the provision for a release.

Such inconsistencies, if they really are inconsistencies, are the result of different views of public policy touching different acts, or rather touching the extent to which rights should go. The court of New Hampshire determines that creditors' rights should not be abridged in regard to 'trusts' created by their debtors; at the same time the court determines that those rights may well be abridged in regard to provisions for release in assignments; the legislature takes a contrary view of the latter question, and fixes the law accordingly.

Can anything be done, or is it desirable that anything should be done, to change this, or to prevent its repetition elsewhere? The question is not easily answered. A sound public policy should always be the aim in making or in declaring law; and such policy may dictate that creditors' rights should be broad in one particular, narrower in another. All that can justly be said in the nature of criticism appears to be

¹ *Googins v. Gilmore*, 47 Maine, 9, ante, p. 244.

² *Oliver v. Eaton*, 7 Mich. 108; *Gay v. Bidwell*, ib. 519; ante, pp. 245, 246.

³ *Wheeler v. Evans*, 26 Maine, 133; *Hubbard v. McNaughton*, 43 Mich. 220.

this: Until the law is otherwise established, creditors' rights are, it is believed, presumptively broad enough to make fraudulent every attempt of the debtor to prevent an immediate resort to his property, except where that attempt consists only in some act done in the ordinary course of business or in some act otherwise (as in the case of preference) authorized by law. Much of the discussion in the foregoing pages is directed to establishing this proposition. That presumption is believed to be a very strong one, and not to be overcome but by considerations of public policy of the most weighty character. To put this general statement into concrete form, it is apprehended that the law of New York, as expounded by the courts of that state, justly expresses in general the extent, presumptively, of creditors' rights as a new question everywhere under the statutes against fraudulent conveyances; and that it should be accepted accordingly unless the weightiest considerations are shown to the contrary. In any general revision of the laws of a state, or in any special revision of the laws relating to the subject of conveyances in fraud of creditors, it will be well to bear this in mind.

The law of New York, as regards our present subject, prevails, in all substantial respects, in states having a third of the population and more than half the wealth of the Union;¹

¹ The following is the list: New York, New Hampshire, Pennsylvania (which goes still further as to retaining possession), Ohio, Indiana (there has been some change in regard to the law of Indiana touching mortgages reserving rights in the mortgagor; see ante, pp. 242, 243), Illinois, Missouri, and perhaps some other states. In these states creditors' rights under the statutes against fraudulent conveyances are maintained complete.

It is not due to accident that the law of New York has been taken as the model for other states. Some of her most eminent and experienced lawyers

were engaged in the work of the great revision of 1829, and engaged upon it for years with most anxious care. The result was the most valuable and the most influential work of legislation (excluding the making of the constitution) which this country has ever had.

The statutes of Elizabeth which fell to Chief Justice Spencer, then retired, had their full share of laborious attention, as letters of the distinguished commissioner attest (Butler, Revision and the Revisers, 30). The subject indeed appears to have been for many years one of great prominence in New York, and to have engaged the minds, and

and in *most* respects it is the law of more than half the people of the whole country. The high standard of honesty which serves the well-being of so great a part of the country can hardly fail to be best for every healthful commonwealth of America. General disaster or other serious public disorder might furnish a reason for abridging the rights of creditors, irrespective of statutes of bankruptcy, but it is extremely doubtful whether anything else could be urged as of similar persuasiveness.

But it should be well remembered that the fact that differences exist even in the same state in regard to the extent of creditors' rights does not involve or imply any difference of view in regard to the meaning of 'fraud' or 'intent' to defraud. Upon that matter all our courts, rightly considered, are substantially agreed, and the English courts with them; when under the statutes against fraudulent conveyances the rights of creditors, whether complete or abridged, are transgressed, fraud, or intent to defraud, is made out. There is no authority which decides that fraud means one thing in regard to creditors' rights in a matter in which such rights are complete and another thing in regard to a matter in which they are incomplete. Where then the act of the debtor interferes with the 'natural rights of creditors,' there may be two distinct questions for consideration, first, whether the natural rights of creditors have been or should be abridged, secondly, if they have been or are to be abridged has the debtor crossed the line? The answer to the latter question answers the question whether the act was done with intent to hinder, delay, or defraud.¹

secured the patient study, of bench and bar alike. And fortunately great judges were on the bench from the first to expound the new legislation; Chancellor Kent had indeed long before been retired, but the time of Walworth, and Bronson,

and Denio, and Comstock, and Selden, was a golden age in the judiciary of New York. They and their associates expounded the statutes against fraudulent conveyances for all time.

¹ When the 'natural rights of cred-

Further with regard to actual changes in the law within the same state, touching creditors' rights, it should be observed that when such changes are made by statute¹ the law as it stood when the debt was incurred or the demand created will govern, and not the law as afterwards enacted.² And 'debt incurred' or 'demand created' has regard to the very inception of right, although the same is then entirely contingent or conditional; as we have elsewhere seen.³ The most common instance of the application of the principle above stated is in changes of the homestead or exemption laws.⁴ Another instance which has come before the courts is the change of the common law right of a husband to his wife's personalty, after the conveyance in question;⁵ the fact that the wife would now be entitled to the personalty would not justify the husband in making a conveyance to her in the way of payment for it.⁶

itors' have not been interfered with on the face of the transaction, and, further, when the act is one which on its face is naturally or legally innocent, as e. g. a mere sale, by a person embarrassed with debt, of property for valuable consideration, the question of the wrongfulness of the act turns necessarily on the question of personal intention to hinder, delay, or defraud; there is in such a case no external standard or test to apply. See next chapter, p. 381 and § 2.

¹ Quære in regard to changes made by overruling a decision not in consequence of statute. Comp. 1 Story's Equity, pp. 121, 122, note, 13th ed.

by the present writer. As to the effect of declaring a statute unconstitutional comp. *Harney v. Charles*, 45 Mo. 157, and the note just cited.

² *Keel v. Larkin*, 72 Ala. 493; *Peery v. Cabannia*, 70 Ala. 253; *Bolling v. Jones*, 67 Ala. 508; *Smith v. Cockrell*, 66 Ala. 64; *Green v. Branch Bank*, 33 Ala. 643; *Fearn v. Ward*, 65 Ala. 33; *Nelson v. McCreary*, 60 Ala. 301; *Ream v. Karnes*, 90 Ind. 167.

³ *Keel v. Larkin*, *supra*; chapter 6, § 3.

⁴ See the cases just cited.

⁵ *Ream v. Karnes*, *supra*.

⁶ *Ib.*

CHAPTER XV.

INTENT TO DEFRAUD: CONCLUSION.

§ 1. ABSOLUTE FRAUD: PRIMA FACIE PRESUMPTION.

THE meaning of the phrase 'intent to delay, hinder, or defraud' of the statute of Elizabeth, and the corresponding statutes in this country, has now been considered in both its negative and its positive aspects in several broad classes of cases. In the former aspect it was found that the intent was not to be looked for necessarily in any personal motive or purpose to delay or defraud, — that it might be made out therefore by facts external; in the latter aspect it has been found what external facts, so far as the inquiry has been pursued, furnish the test, or rather establish the intent, of the statutes.¹ These external things thus found are, when they interfere with the *rights of creditors*, the following: Voluntary conveyances, trusts or reservations in general in favor of the grantor of property conveyed by a debtor, trusts or reservations in favor of a mortgagor of goods, retention of possession by a vendor of goods, and provisions in assignments for creditors, against the rights of non-assenting creditors, whether in the interest of the assignor or not. How wide a range of the law these subjects make the foregoing pages attest.

¹ It is not uncommon to use the words 'fraudulent *purpose*' as a short equivalent for the statutory words 'intent to hinder, delay, or defraud' ('intent to delay, hinder, and defraud' in the statute of Elizabeth). See e. g. *Todd v. Nelson*,

109 N. Y. 316, 326. But that is not to be commended of a term having so technical a meaning as 'intent' in the statutes, in most cases at all events, has. Any translation of the word into its popular meaning is likely to mislead.

It is still open to reply that these are only special cases, and are to be considered as exceptions; that naturally the word 'intent' implies motive, and therefore it must be taken to be personal; and that until all the cases that may arise have individually resulted in decisions to the contrary, or until competent authority considering the whole subject has so declared, it cannot be considered that the natural meaning of the statute is not the meaning to be applied except in the special cases otherwise determined.

Such an argument would have been valid in an early stage of the construction of the statute; but it is a significant fact that it was not then advanced. On the contrary point after point in the law, beginning with the time of Coke (as Attorney-General), arose and was determined as if upon the theory that the language of the statute was technical, and not to be taken in its literal or popular sense; until at last, and that long ago, it was fairly demonstrable that in the actual administration of the law, the literal or natural meaning of the term had in most cases been displaced for another.¹

The truth appears to be that to have taken the statute literally would in most cases have nullified the purpose of the law. And accordingly, in all the great range and number of cases relating to the statutes against fraudulent conveyances there is hardly to be found, apart from one or two well-defined situations, a single specific authority, which would be generally considered as of weight, for the proposition that the 'intent' of the statutes is a personal intent. It is true indeed that proof of such an intent will always make a case under the statutes; and it is every day practice for the courts to receive evidence for and against such intent.² But in

¹ See note at end of this chapter.

² See e. g. *Seymour v. Nelson*, 14 N. Y. 567; *Snow v. Paine*, 114 Mass. 520; *Hall v. Moriarty*, 57 Mich. 345; *Bedford v. Penny*, 58 Mich. 424; *Royce v. Gazan*, 76 Ga. 79. That actual in-

tention to defraud will invalidate a conveyance otherwise good against creditors, see *Edmunds v. Mister*, 58 Miss. 765; *Chapman v. McIlwrath*, 78 Mo. 38. Mere intention to defraud, however real, will not, it is to be remem-

most cases the effect, whatever the purpose, of evidence of a personal intention to defraud is only to strengthen a case that, if sustained, might have been made without such evidence.

It has occasionally been asserted¹ or assumed, on the footing apparently of a general truth, that the intent of the statute is a personal intent. The one or two cases however which have ventured to decide the point according to the popular meaning of the word, with reference to any of the great branches of the subject under consideration in the preceding chapters have either been overruled or have failed of any following. A case² of the kind may be found in Rhode Island; the court there proceeded apparently upon the literal meaning of the word 'intent' in the case of an assignment containing provisions wrongful towards creditors; but that case has lately been discountenanced in the same state, upon that very point.³ It is believed then that the proposition is in substance established, that a debtor, in determining to

bered, avoid preferences of, and by many authorities, assignments for creditors. *Emerson v. Senter*, 118 U. S. 1; *Marbury v. Brooks*, 7 Wheat. 556, 577; *Brooks v. Marbury*, 11 Wheat. 78, 89; *Tompkins v. Wheeler*, 16 Peters, 106, 118; *Thomas v. Talmadge*, 16 Ohio St. 433, 439; *State v. Keeler*, 49 Mo. 548; *Wilson v. Eifler*, 7 Cold. 31; *Governor v. Campbell*, 17 Ala. 566; *Hempstead v. Johnston*, 18 Ark. 123, 140; *Cornish v. Dews*, *ib.* 172, 181; *Hunt v. Weiner*, 39 Ark. 70, 75. See chapter 19, § 1.

¹ See e. g. *Nunn v. Wilsmore*, 8 T. R. 521. *Le Blanc, J.*: 'Whether or not a deed is to be considered as fraudulent with respect to creditors must depend upon the motives of the party making it.' So in *Ballard v. Eckman*, 20 Fla. 661, 682. See also *Beasley v. Bray*, 98 N. Car. 266, 270.

² *Nightingale v. Harris*, 6 R. I. 321. See also *Dockray v. Dockray*, 2 R. I. 547; *Spencer v. Jackson*, *ib.* 35. These

cases are admittedly opposed to the authorities in other states. See *Nightingale v. Harris*, *supra*, and *Gardner v. Commercial Bank*, *infra*.

³ *Gardner v. Commercial Bank*, 13 R. I. 155, a case which underwent great consideration. *Nightingale v. Harris* had drawn a distinction between an attempt by a debtor (in an assignment for creditors) at the exercise of unwarranted power, — called at p. 333 'constructive fraud,' — and the 'intent' to defraud of the statute against fraudulent conveyances. Proof of the intent of the statute would, as showing a purpose to defraud, defeat the whole transaction; while an attempt at the exercise of unwarranted power would simply be null, thus leaving the rest of the transaction to stand. As to this it was now said by the court in *Gardner v. Commercial Bank*, at p. 171, that 'the decision is not entirely self-consistent; for while it insists upon actual fraud

make and making an alienation of his property when he knows or has sufficient reason to know that the act, not fall-

as the fatal element and acquits the assignor of any actual fraud, it nevertheless annuls the provision in favor of the releasing creditors, because the provision, being separable, can be annulled without annulling the entire deed. It follows that if the illegality had infected the entire deed, so as not to be separable, the entire deed would have had to be annulled without any actual fraudulent intent, which is what the court says, in its opinion, is not according to the statute.'

And then referring to the matter of conscious intent to defraud, *Nightingale v. Harris* is thus spoken of: 'The opinion contains some expressions which seem to imply that what the court mean by an actual fraudulent intent is a *consciously* dishonest intent. If this be the meaning, it would follow that no assignment could be set aside, whatever its provisions, if the assignor supposed he had a right to make it. We think however that the expressions referred to were unguarded.' And it is added that the 'intent is necessarily fraudulent, however the assignor may regard it.'

The fraud is actual then in the eye of the law, whether there was a personal intent to defraud, or only an invasion of creditor's rights without any bad intent; the fatal and sweeping effect, as seen in *Gardner v. Commercial Bank*, *supra*, and in the authorities generally, shows that.

It may be noticed further that the language of the American statutes points less, when literally taken, to personal motive than does the statute of 13th Elizabeth. It is a most significant fact that the English statute received the construction given to it; for that stat-

ute speaks of alienations 'devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay,' etc. If that language is to be taken in a sense which disregards an honest motive, a motive which may look really to the good of creditors (comp. the language of Cotton, L. J. in *Ex parte Chaplin*, 26 Ch. D. 319, 331, ante, p. 7, note), surely the milder language of our statutes is not strained by the construction it has generally received; for our statutes — those which have not adopted the statute of 13th Elizabeth in terms — speak simply of an 'intent to hinder, delay, or defraud.'

The text too is consistent with a ruling that a verdict that the object of a conveyance was to put the property beyond the reach of creditors is not a finding of fraud, for it may be that the property was exempt, or that it was transferred to a creditor by way of preference. *Phelps v. Smith*, 116 Ind. 387.

It will be convenient to collect here the more important cases of recent times in which this matter of personal intent has been specifically considered (with the result stated in the text). *Sutherland v. Bradner*, 115 N. Y. 410, 415; *Lukins v. Aird*, 6 Wall. 78; *Buckley v. Duff*, 114 Penn. St. 596; *Sanger v. Guenther*, 73 Wis. 354, 357; *Gardner v. Commercial Ins. Co.*, *supra*; *Robinson v. Clark*, 76 Maine, 493, ante, p. 87, note; *Cole v. Tyler*, 65 N. Y. 73, same note; *Grover v. Wakeman*, 11 Wend. 187 (refusal to consider denial of intention to defraud); *Jackson v. Seward*, 5 Cowen, 67 (reversed, 8 Cowen, 406, but not on that point); *Schumann v. Peddicord*, 50 Md. 560; *Green v. Trieber*, 8 Md. 11; *American Bank v. Inloes*, 7 Md. 380; *a. c.* 11 Md. 173; *Bridges*

ing within certain situations, will in its natural effect, hinder, delay, or defeat his creditors, thereby does the same with 'intent to hinder, delay or defraud' them within the meaning of the statutes;¹ what constitutes 'sufficient reason to know'

v. Hindes, 16 Md. 101; *Farrow v. Hayes*, 51 Md. 498; *Sims v. Gaines*, 64 Ala. 392; *Lehman v. Kelley*, 68 Ala. 192; *Marmon v. Harwood*, 124 Ill. 104; *Connelly v. Walker*, 45 Penn. St. 449, 454; *Hunters v. White*, 8 Gratt. 26, quoted ante, p. 185, note; *Cock v. Oakley*, 50 Miss. 628; *Harmon v. Hoskins*, 56 Miss. 142; *Crandall v. Lincoln*, 52 Conn. 73 (not under the statute against fraudulent conveyances, it seems); *Hough v. Dickinson*, 58 Mich. 89 (instructions to jury); *Fellows v. Smith*, 40 Mich. 689; *Watkins v. Arms*, 64 N. H. 99; *Stratton v. Putney*, 63 N. H. 577; *Lang v. Stockwell*, 55 N. H. 561; *Renche v. Wynne*, 86 N. Car. 268, ante, p. 86, note; *Cheatham v. Hawkins*, 80 N. Car. 161; *Gregory v. Perkins*, 4 Dev. 50, 53; *Burgert v. Borchert*, 59 Mo. 80, 83 (intent 'such as the statute prohibits' enough); *Winchester v. Charter*, 12 Allen, 606, 609 ('whenever therefore no actual fraud or express intent to hinder and delay creditors is proved, it is necessary,' etc.); s. c. 97 Mass. 140, 143; *Kimball v. Thompson*, 4 Cush. 441, ante, p. 114; *Adams v. Paige*, 7 Pick. 542, last paragraph but one of opinion, Parker, C. J.; *Cook v. Johnson*, 12 N. J. Eq. 51; *Claffin v. Mess*, 30 N. J. Eq. 211, ante, p. 105, note, on 'fraud in fact'; *Roberts v. Radcliff*, 35 Kans. 502; *Blum v. McBride*, 69 Texas, 60, 63; *Ex parte Mayou*, 4 De G. J. & S. 664 (semble); *Ex parte Chaplin*, supra; *Ex parte Jackson*, 14 Ch. D. 725, 741, ante, p. 10, note; *Thompson v. Webster*, 7 Jur. n. s. 531, H. L.; *Freeman v. Pope*, L. R. 5 Ch. 538, ante, p. 83; *Cornish v. Clark*, L. R. 14 Eq. 184; *Jenkyn v.*

Vaughan, 8 Drew, 419, 424, ante, p. 175, note; *In re Wood*, L. R. 7 Ch. 302, 307; *Doe d. Otley v. Manning*, 9 East, 59 (27 Eliz.); *Trowell v. Shenton*, 8 Ch. D. 318 (same); *In re Maroney*, 21 L. R. Ir. 27, 46, 59, 61. See also *Washburn v. Hammond*, 24 N. E. R. 33, 34.

Some of the English cases were indeed bankruptcy cases; but they concern fraudulent conveyances of the statute of 13th Elizabeth, and are directly in point. *In re Wood*, supra. See chapter 24, § 4. The same should be said of *Wolf v. Stix*, 99 U. S. 1 (s. c. 96 U. S. 541). In that case the learned Chief Justice said that the fraud which would prevent a debtor's discharge in bankruptcy was not 'such fraud as the law implies from the purchase of property from a debtor with the intent thereby to hinder and delay his creditors in the collection of their debts;' the fraud preventing a discharge being positive fraud in personal intention. *Neal v. Clark*, 95 U. S. 704.

In *Schuman v. Peddicord*, supra, the court says: 'In declaring that every one must intend the legal consequences of his own voluntary act the law provides a more certain and reliable standard by which the intention is to be ascertained.'

¹ The subject is accurately put in *Blum v. McBride*, 69 Texas, 60, 63. 'This being the natural or ordinary result of such a transaction [the defeat of creditors is referred to], the parties to it must be held to have intended it, and to have entered into it with intent to hinder and delay if not to defraud creditors.' Preference was rightly distinguished. So again in a Wisconsin

including both matters determined by law and such as must be decided as facts.¹ That the fraud is actual in contemplation of law, and not constructive, appears from the effect of the act; it is only necessary to point to the examples in preceding pages of honestly conceived provisions for an insolvent mortgagor or assignor,² and honest attempts to extend a time of credit,³ — these avoid the whole transaction, according to the general and the better rule. Personal intention to defraud could do no more.

It is not uncommon however to speak of cases in which there is an absence of any personal intention to defeat creditors as cases of 'constructive fraud.' The main objection to the term is that it suggests, if it is not founded upon the

case, in regard to a matter of withholding a mortgage from record so as not to embarrass the mortgagor in his business, the want of any personal intention to defraud creditors was ignored, and the effect of the withholding to the undoing of creditors, if allowed, was made the test. 'This undoubtedly would be the inevitable effect of such secret arrangements between the mortgagor and the mortgagee.' Hence it was fraudulent. *Sanger v. Guenther*, 73 Wis. 354, 357, following *Standard Paper Co. v. Guenther*, 67 Wis. 101.

For cases to the same effect, which are well-known authorities, see *Freeman v. Pope*, L. R. 5 Ch. 538; *Babcock v. Eckler*, 24 N. Y. 623 (followed in *Rencher v. Wynne*, 86 N. Car. 268; *Cheatham v. Hawkins*, 80 N. Car. 161); ante, p. 83.

¹ See *Winchester v. Charter*, 97 Mass. 140, 143 (voluntary conveyance by debtor who 'had reasonable ground to believe that he might be unable to pay'); *Crawford v. Kirksey*, 55 Ala. 282, 293. On the other hand for the grantee to *take* the property, knowing or having reason to know the character of the debtor's act, is not, properly speak-

ing, a fraud, though the property must in such a case be held subject to the claims of creditors unless the grantee is himself merely a lawfully preferred creditor. See chapter 19. Of course if the grantee is a confederate with the grantor, his conduct is fraudulent; but no statute makes a grantee with notice or mere knowledge guilty of fraud, nor does the common law. And (speaking with reference to the definition of fraud in this work) the average man would not necessarily intend to aid the debtor in circumventing his creditors by merely taking the property. Taking under bankruptcy laws, from a debtor, knowing or having reason to know that he is insolvent, does not put the taker on the footing of the debtor; the authorities do not characterize the taker's act as fraudulent. The property must be given up; the taker is not within the saving of purchase for value without notice; that is all. *Comp. Stucky v. Masonic Bank*, 108 U. S. 74; *Merchants' Bank v. Cook*, 95 U. S. 342; *Purinton v. Chamberlain*, 131 Mass. 589.

² Ante, pp. 273 et seq.

³ Ante, pp. 292 et seq.

notion, that the 'intent' of the statute is in reality a personal intent.¹ In so far as it may be designed to indicate that the court disclaims the purpose of fastening a stigma upon the debtor, where his conduct was not base, the use of the term, or of its cognate 'legal fraud,' is well enough. But when the *effect* of intended fraud in the popular sense is produced, it is for legal purposes confusing and misleading to speak of the act as being something short of fraud.

This should be true as well of the contrast sometimes drawn, and properly enough for certain purposes, between 'fraud in law,' and 'fraud in fact;'² no more should be meant by 'fraud in fact' or 'actual fraud' (in the distinction e. g. suggested by Chancellor Kent, and followed in some states, touching existing and subsequent creditors in the matter of voluntary conveyances³) than fraud according to the common conscience. It should not be forgotten that, like philosophy, science, and the many branches of industry, the law has its own technical terms, and uses and may well use them in its own way, regardless of the meaning attached to them in popular speech; and 'fraud' is one of those terms.⁴

¹ An example may be seen in a recent case, in which it is said that it is 'constructive fraud' for a debtor to make a voluntary conveyance, if he had no personal intention of defeating his creditors; but the conveyance is entirely invalid. While on the other hand if he intends to defeat his creditors, or if he conveys subject to a secret trust for himself, the case is one of actual fraud. *Crawford v. Kirksey*, 55 Ala. 282, 292. But a trust may, as a mere matter of fact, be honestly reserved, as well as a voluntary conveyance may be honestly made, by a debtor, as where it is, in the quaint language of Coke (*infra*, p. 389, note), 'in regard of his poor estate,' or of his integrity, or services, or the value of his past business. The effect in all these cases being the same, so far

as the purely civil administration of the law is concerned, it is best to designate the act as the statutes authorize.

Another objection to using the term 'constructive fraud' for such cases is that that term has another well-established and appropriate use. See vol. 1, pp. 10, 261 et seq.

² Except in cases of transactions 'naturally innocent.' *Infra*, pp. 381, 383 et seq.

³ *Reade v. Livingston*, 3 Johns. Ch. 481, 500; *Hagerman v. Buchanan*, 45 N. J. Eq. 677; *Gordon v. McElwain*, 82 Ala. 247; *ante*, p. 181.

⁴ *Ante*, pp. 9, 10. Comp. the language of Bowen, L. J. in *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 612: 'The terms "maliciously," "wrongfully," and "injure" are words

The courts of Ireland, as well as those of England and of America, support the general view of the subject here taken. In a very recent case¹ arising under bankruptcy law, but also argued and treated by the court as a case for the operation of the statute against fraudulent conveyances (the Irish Act being the same as that of 13th Elizabeth), the word 'intent' was minimized. It was declared that ordinarily it did not require the finding of personal intention; the language of authority in regard to voluntary conveyances being treated, apparently, as general in meaning.²

And then the construction of the Bankruptcy Act, 1869, was referred to, as being to the same effect. Before the year 1869 the bankruptcy statutes had spoken of conveyances 'with intent to defeat or delay creditors;' but the Act of that year had omitted the words 'with intent' and had used the words 'fraudulent conveyance, gift, delivery, or transfer.' It was now shown not merely that 'fraudulent conveyance' had the same meaning as conveyances 'with intent' to defraud, but further that the change was made so as to make it clear that it was not necessary that any actual intention to defraud should be found; the English authorities themselves having said that the words 'with intent' were 'superfluous and misleading.'³ The Court of Chancery in appeal had declared that 'with intent' had been left out of the Act of 1869 'because there is often, in fact, no such intent, and in order to prevent the court and jury from being obliged to find contrary to the actual fact.' And this Lord Asbourne, Chancellor, with the support of the other judges, interpreted as meaning that, to determine whether a conveyance was fraud-

all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide.'

¹ In re Maroney, 21 L. R. Ir. 27.

² Ib. p. 46; *Jenkyn v. Vaughan*, 3 Drew. 419, 424, *Kindersley, V. C.*, quoted ante, p. 175, note.

³ In re Wood, L. R. 7 Ch. 302, 307. See also *Jones v. Harber*, L. R. 6 Q. B. 77, *Blackburn, J.*; *Young v. Fletcher*, 3 Hurl. & C. 732.

ulent 'you should consider the effect and spirit of what is done, and that the court is not to be fettered by having to find a state of facts which may not exist at all.'¹ The courts in bankruptcy had 'struggled not to have to find the intent.'

It was pointed out however by Palles, C. B.² that there were certain cases in which it was necessary, under the bankruptcy legislation, to prove that the act in question had been done 'with an intent in the mind of the bankrupt to defeat or delay his creditors;' but those were cases in which the act was naturally innocent, 'as for instance departing from the realm, or [a man's] absenting himself, or keeping house.'³ All the acts had in the earlier legislation been described as acts to be done with intent to defeat or delay creditors; but it was only those which were naturally innocent that must have been done with personal intention to defraud.⁴ And that should well be noticed, for it furnishes a key to the solution of the chief difficulty of the subject.

The view here taken of the 'intent' of the statutes derives further support from the analogous case of intention in actions for deceit and in estoppels by misrepresentation. While it is necessary for the plaintiff in such cases to prove intention, he is not required to prove any personal intention in the defendant; enough if it is made to appear that the plaintiff had reasonable ground to suppose an intention. That is enough as matter of law; the fact of reasonable ground, the ground, that is to say, which would be sufficient for the average man, is not merely evidence of the intention,

¹ In re Maroney, at p. 46.

² At p. 59.

³ Quoting Mellish, L. J. in In re Wood, L. R. 7 Ch. 302, 306.

⁴ Finally turning again to the statute of 13 Eliz, c. 5, the learned Chief Baron, after mentioning cases of actual intention, says: 'In other cases no such intention actually exists in the mind of the grantor, but the necessary or proba-

ble result of his denuding himself of the property included in the conveyance, for the consideration, and under the circumstances actually existing, is to defeat or delay creditors, and in such a case . . . the intent is, as a matter of law, assumed from the necessary or probable consequences of the act done.' In re Maroney, 21 L. R. Ir. 27, 61.

it establishes the intention.¹ There is no difference in principle between that case and the intent of the statute of Elizabeth; the source of the rule, whether common law or statute, cannot affect the case; indeed both proceed from the same ultimate source, the common conviction touching rights.

The question of the meaning of the 'intent' of the statutes will arise in one of these three aspects: First, where it is to be judged as absolute matter of law; secondly, where it appears in the form of a *prima facie* presumption; thirdly, where no presumption is raised at all, and the whole case, at least on the creditor's side, turns upon ordinary evidence. Of the first of these aspects it is only needful to say that the decision of the question never looks to the state of mind of the debtor; the acts done and their natural effect are always the basis of the action of the court. Whether the effect of such an act has already been determined, or whether the judge must now determine the case upon his own view of the matter, is all the same; in neither case will he hesitate to act because of the absence of evidence touching the debtor's actual intention. The same will be true in principle of the second of the three aspects. If the creditor's case has raised a *prima facie* presumption of 'intent to hinder, delay, or defraud,' that presumption will stand (assuming the evidence on which it rests to be true) unless the fact from which it arises is excused, justified, or offset by some other fact. For the case is this:

¹ Among cases of actions for deceit see *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 404, and cases cited; and see especially *Collins v. Denison*, 12 Met. 549, a leading case in which the court declares that certain facts showing other things 'would fully authorize and *require* the jury to find the intent;' *Claffin v. Commonwealth Ins. Co.* 110 U. S. 81; *Johnson v. Wallower*, 15 Minn. 474; s. c. 18 Minn. 288; ante, vol. 1, pp. 535-537. The cases of estoppel are, if possible, still more explicit. Among others see *Tracy v. Lincoln*, 145 Mass. 357; *Kinney v. Whiton*, 44 Conn. 262, 269; *Leather Manuf. Bank v. Morgan*, 117 U. S. 96, 108; *Freeman v. Cooke*, 2 Ex. 654; *Cornish v. Abingdon*, 4 Hurl. & N. 549; *Bigelow, Estoppel*, 629 et seq. 5th ed.

The creditor has shown a fact the ordinary effect of which may well be deceptive; he has shown, let us say, in a case of sale, in New York, of a horse by his debtor, that shortly afterwards the debtor had possession. Now here is a case *prima facie* within the meaning of the statute, not because retaining possession indicates a purpose in the debtor's mind to defraud any one, but because it is likely to deceive;¹ the intent of the average man is presumptively shown. This way of putting the case shows that it is no answer that the debtor had no personal intention to defraud; such fact is irrelevant.² The claimant must, as we have said, excuse, justify, or offset the presumption; that is to say, he must meet the presumption with some fact which takes away the effect of the presumption, and *that* could not be done by proving his honesty. He may show for example that the horse, having been duly delivered, had just now strayed away and returned to its old home, where it was seized; some external fact must be proved, which would annul the average man's presumptive intent to defraud.

The third aspect makes a very different sort of case, and must be carefully considered.

§ 2. FRAUD ON MERE EVIDENCE: ACTS NATURALLY INNOCENT.

Before proceeding directly to the third aspect of intent to defraud it is of first importance to observe that a debtor, even if in fact insolvent, while he still has dominion over his property, and in virtue of his dominion over it,³ may do many things, with the sanction of law, which may possibly, or probably, or even certainly delay or defeat his creditors. He may prefer his creditors; he may sell, mortgage, assign, or otherwise

¹ *Martin v. Mathiot*, 14 Serg. & R. 440; *Lord v. Devendorf*, 54 Wis. 491; 214; ante, p. 327. *Sexton v. Wheaton*, 8 Wheat. 229, 242,

² *Cole v. Tyler*, 65 N. Y. 73, ante, Marshall, C. J.; *Brashear v. West*, 7 pp. 87, 88, note. *Peters*, 608, 614; *Jessup v. Hulse*, 21

³ *Landauer v. Victor*, 69 Wis. 434, N. Y. 168, Selden, J.

dispose of his property, as though he were not a debtor.¹ The proposition is perfectly familiar, but its significance will be made more real by two or three illustrations:—

A owes \$50,000 to foreign creditors and as much more to home creditors. He conveys all the property he has, of the clear value of \$50,000, consisting in lands at home, to B in consideration of stocks and bonds of the market value of \$10,000 and B's undertaking to pay off the foreign creditors. B has notice of A's situation, but is financially responsible. There is no actual intention to delay or defraud. In this case the foreign creditors *may* be delayed; while the home creditors *must* be defeated, in great measure. But the transaction is valid, because A has entire dominion over his property, and he has but made a simple sale without encumbering it with any provisions fraudulent in themselves or *prima facie* fraudulent.

Another illustration: A sells and conveys a farm in trust for his son B, in consideration of which B covenants to pay all debts incurred by A prior to the transaction, in connection with the working arrangement of the farm, and also to become surety to A in a certain important undertaking. A has no other property; and a debt due to C, and known to B, not having been incurred in the management of the farm, is cut off by the deed. B becomes surety as agreed, and is financially responsible; and there was no actual intention to defeat C. The transaction will be sustained against C;² for it is a

¹ The cases are very numerous. Besides those in note 3, p. 383, see *Thornton v. Lane*, 11 Ga. 459; *Jessel v. Ewan*, 35 Ark. 127; *Lienkauf v. Middleton v. Pollock*, 2 Ch. D. 105, *Morris*, 66 Ala. 406. *Jessel, M. R.*; *Alton v. Harrison*, L. R. 4 Ch. 622; *Sisson v. Roath*, 30 Conn. 15; *Southern Lead Co. v. Haas*, 73 Iowa, 399; *Walden v. Murdock*, 23 Cal. 540; *Totten v. Brady*, 54 Md. 170; *Tomlinson v. Matthews*, 98 Ill. 178; *Frank v. King*, 121 Ill. 250; *Brigham v. Hubbard*, 115 Ind. 474; *§ 5.*

² In *re Jackson*, 20 Ch. D. 389, *Fry, J.* As to the matter of suretyship the case of the text has been varied from the real case, to avoid any doubt in this country. Instead of agreeing to become surety to A, B had agreed to support A; as to which see chapter 18.

simple exercise of dominion, without added facts to bring it within the law of fraudulent conveyances.¹

These are cases of transactions 'naturally innocent' in contemplation of law,² indeed necessarily innocent by reason of the fact that, apart from special statute, the law does not deprive a debtor, even upon becoming insolvent, of his power to dispose of his property;³ so far, the fact that he cannot pay his debts in full, and that his creditors or some of them are certain to be worse off than they were before the transfer, must be accounted nothing.⁴ To the simple or at least lawful act of dominion something wrongful must be added to bring the case within the operation of the statutes; there must be a trust or a reservation out of the property, for the debtor,⁵ or there must be an unlawful provision of some sort affecting the rights of creditors;—or, to come directly to the new class of cases under the third aspect of intent, the transaction, if 'naturally' or legally 'innocent' as by being on its

¹ See also *Ex parte Mercer*, 17 Q. B. D. 290, C. A., ante, pp. 109–111.

² *Supra*, p. 381.

³ Whether an act of the debtor is naturally or legally innocent may sometimes be a difficult question; it may turn upon the construction of a statute, as e. g. in bankruptcy. See *Young v. Fletcher*, 3 Hurl. & C. 732; *Jones v. Harber*, L. R. 6 Q. B. 77; *Marks v. Feldman*, L. R. 5 Q. B. 275, Ex. Ch. Or it may turn upon the course of the common law. But generally speaking the expression would include alienations in the ordinary course of business, on their face.

⁴ Whether this *ought* to be so is another question. See ante, p. 7, note.

⁵ 'If the deed is bona fide, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the statute of Elizabeth.' *Thesiger*, L. J. in *Ex parte Games*, 12

Ch. D. 814, C. A., a case of a mortgage for value with right in the mortgagor to retain possession and sell. See ante, pp. 254, 255, n. So in *Holmes v. Penney*, 3 Kay & J. 90, Wood (afterwards Lord Hatherley), V. C. says: 'I am not aware of any case in which a deed of this kind [a family settlement without notice of debt, and for value] has been supported when it contained a power for the trustees to hand over part of the interest to the settlor.' See also *Alton v. Harrison*, L. R. 4 Ch. 622. Giffard, L. J. quoting language of the Vice-Chancellor: 'If the deed of mortgage and bill of sale was executed by Harrison honestly for the purpose of giving a security to the five creditors, and was not a contrivance resorted to for his own personal benefit, it is not void, but must have effect.'

Further see *Lukins v. Aird*, 6 Wall. 78; and chapters 9–11.

face an ordinary exercise of dominion, must be a *subterfuge*. The statutes condemn a debtor's exercise of dominion over his property when the exercise is with intent to delay or defraud his creditors; and the debtor's actual purpose to delay or defraud his creditors in a transaction otherwise proper is such a case; it is an attempt to do, under the forms of the law, what the law condemns. The debtor has the legal right to prejudice the collection of his debts, in the straightforward disposal of his property, as by ordinary traffic with the purposes necessarily incident, but he must not dispose of it in the apparent way of traffic with the purpose, not incident thereto, of defeating his creditors. This then is that third aspect of 'intent,' where the wrongfulness of the transaction is found by evidence short of presumption.¹

It is right then in these cases of innocent transactions, as has lately been declared by distinguished judges, to reject the doctrine that as a matter of law a man intends the natural and necessary consequences of his acts;² that doctrine does not apply to cases in which in the nature of things there can be no external standard or test. *Now* a personal intent is of the essence of the case, though 'natural consequence' might perhaps be evidence of some slight value, if supported by other facts, of such intention.³ Hence the meaning and the

¹ Of course this does not mean that there must be actual and direct evidence, by the admission or declarations of the debtor, of his intention; it only means that the evidence produced must go to show personal intention. When proper evidence of the kind has been produced, though it is wholly circumstantial, the only question is whether it may rationally lead the jury or judge to believe the creditor's allegation. On circumstantial evidence, see vol. 1, pp. 146, et seq.

² Fry, J. (now L. J.) in *In re Johnson*, 20 Ch. D. 389; Lord Esher in *Ex parte Mercer*, 17 Q. B. 290, C. A. See

also *Jones v. Harber*, L. R. 6 Q. B. 77, Blackburn, J.; *Shrubsole v. Sussama*, 16 C. B. N. s. 452.

³ But even this is doubtful. See the forcible observations of Lord Esher in *Ex parte Mercer*, supra. The case of *Freeman v. Pope*, L. R. 5 Ch. 538, the most familiar authority as to the rule of necessary consequences, was, it should be remembered, a case of a *voluntary* settlement, not one of the conveyances 'naturally innocent.' And so it is expressly put by Lord Hatherley, in answer to a suggestion of the Vice-Chancellor, who could find no actual intention to defraud. L. R. 9 Eq. 206.

significance of statements from the bench that a creditor will find 'great difficulty' in making a case against a purchaser for value;¹ those statements apply only to cases in which the transaction is 'naturally' or legally 'innocent.' The creditor has first of all to show that the debtor acted with intent in his mind to delay or defraud; that is the 'great difficulty;' after that the case is like any other,— the purchaser must now bring himself within the saving of the statute or lose the property.²

It will be observed that the fact that, in transactions 'naturally innocent,' a personal intention to delay or defraud creditors must be shown, does not affect the proposition that wherever there is conduct such as would constitute intention to defraud in the average man, or (what is the same thing) would directly hinder or defeat creditors, there is a case of 'intent to hinder, delay, or defraud;' for in such innocent transactions there would be no intention to defraud in the average man. The transaction is innocent and lawful for every one; and where harm follows from doing only what every one may lawfully do, the case cannot, in any view, be treated as intended *wrongdoing*. It only comes to this, that in innocent transactions the average man, and all men, must actually and personally intend to hinder, delay, or defraud creditors, in order to bring the matter within the operation

Lord Hatherley, after saying that a jury should be told that the necessary effect of a voluntary settlement 'was to be considered as evidencing an intention to do so,' said: 'It is established by the authorities that in the absence of any direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then since it is the necessary consequence of the settlement (supposing it effectual) that

some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute.'

¹ Harman v. Richards, 10 Hare, 81, 89, Turner, L. J.; In re Johnson, 20 Ch. D. 389, 394; Holmes v. Penney, 3 Kay & J. 90, 99; Freeman v. Pope, L. R. 5 Ch. 538, 544. See also Nugent v. Jacobs, 103 N. Y. 125.

² See chapters 18 and 19, especially the latter.

of the statutes. And barring such cases it is true to say that the conduct in question must be such as would make a case of intention in the average man.

In one particular this power of dominion, under the law, allows the debtor to go a step further. He may not only prefer one creditor to another; he may do so with the express personal intention of defeating the other creditor or creditors,¹ so far as the statute of Elizabeth and the like American statutes are concerned.² Something further must be added to make a case of intent to defraud within the meaning of those statutes.

One more observation should be made. If the fraud in question is expectant or going on, instead of accomplished, then it may be that personal intent should be charged as a necessary ground of proceedings, unless the case to be met is one of purpose to convey property by gift; for it would be difficult to state a case for interference beforehand in any other way. An application for an injunction to prevent an alienation³ would be an example; so by some cases would an application for an attachment ancillary to an ordinary suit, under statutes, which prevail very widely, authorizing such proceeding on affidavit that the defendant is making away, or is on the point of making away, with his property fraudulently.⁴ In cases of this latter sort it has been decided that personal intent must be charged.⁵

§ 3. GUILT OR WRONGFULNESS.

Finally, it is hoped that the further inquiry, what constitutes the guilt or wrongfulness required to make a case of

¹ Whether the intention is to defeat one creditor or more than one is immaterial. See *In re Maroney*, 21 L. R. Ir. 27, discussing upon this subject *Wood v. Dixie*, 7 Q. B. 892.

² Ante, p. 77.

³ Ante, p. 141.

⁴ Ante, p. 140.

⁵ *McPike v. Atwell*, 34 Kans. 142. See also ante, p. 8, note. In *McPike v. Atwell* the attachment was sought against an assignment for creditors charged to be fraudulent. See however chap. 25, § 3.

fraud by way of 'circumvention,' so far as the statute of 13th Elizabeth and perhaps of 27th Elizabeth, has been shown. As regards the great and typical aspects of the subject, those presented in chapters 7-14, guilt or wrongfulness consists simply in doing certain acts; acts which do not imply, however often they may involve, knavery, dishonor, or personal intent to get the better of creditors; while in transactions naturally innocent there must be personal guilt. For 'guilt' or 'wrongfulness,' in the generic conception of circumvention, is expressed by 'intent to defraud' in the specific conception of the statutes against fraudulent conveyances.¹

¹ From the very first the words 'intent to defraud,' in the cases embraced in § 1 of the text, were taken out of the popular meaning. 'No gift shall be deemed to be bona fide, within the said proviso [to 13th Eliz. c. 5], which is accompanied with any trust.' Twyne's Case, 3 Coke, 80, 81 b (1601). And the following example is given: 'As if a man be indebted to five several persons, in the several sums of £20, and hath goods of the value of £20, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them, that the donee shall deal favorably with him *in regard of his poor estate*, either to permit the donor, or some other for him or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able. This shall not be called bona fide, within the said proviso.' Ac. Wilson's Case, Godb. 161 (1611); 3 Salk. 174.

The same case is put by Coke in another form, as a gift by a father, in consideration of natural affection, of all his goods to his son; and to this Coke says that 'it is to be *presumed* that the father, if he had not been indebted to others, would not have dispossessed himself . . . and therefore it

shall be intended that it was made to defeat creditors.' Again Coke says: 'And as to gifts made bona fide, it is to be known that every gift made bona fide either is on a trust between the parties or without any trust. Every gift made on a trust is out of this proviso [i. e. is made void by the statute]; for that which is, betwixt the donor and donee, called a trust per nomen speciosum is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts.' Again: 'When a man, being greatly indebted to sundry persons, makes a gift to his son . . . without consideration but only of nature, the *law intends* a trust betwixt them, scilicet, that the donee would, in consideration of such gift . . . relieve his father . . . and not see him want.' That is to say, the law declares that certain acts, of themselves, make the 'intent' of the statute.

In another early case the court said: 'Where leases are made with a proviso that if the lessor shall pay ten shillings, then the lease shall be void, such lease shall be void as to the purchaser, because it is apparent that the sum to be paid is not of the value of the land, but only limited as a power of revocation.'

Griffin v. Stanhope, Cro. Jac. 454, 455 (1635). This was said in regard to the statute of 27th Eliz. c. 4, which protects purchasers, against fraudulent conveyances; but there is nothing in that statute, relating to the present question, which differs from the statute of 13th Elizabeth.

So in *Woodie's Case*, cited Cro. Jac. 158 (1608), it was adjudged on the same statute that an assignment of a lease of lands by one quasi in jointure to his wife, he taking the profits, and afterwards selling it without notice, was within the statute, though not made in trust to be revoked, nor with any clause of revocation; because it was a voluntary conveyance at first, and shall be intended fraudulent at the beginning. This decision is approved and, with other like cases, followed by Lord Ellenborough, speaking for the King's Bench, in *Doe d. Otley v. Manning*, 9 East, 59. There was no fraud in the popular sense in that case, as was conceded. See especially *Townsend v. Windham*, 2 Ves. 1, 10, Lord Hardwicke; *Doe d. Bothell v. Martyr*, 1 Bos. & P. N. R. 332; *Evelyn v. Templar*, 2 Bro. C. C. 148; *Trowell v. Shenton*, 8 Ch. D. 318, C. A., Jessel, M. R.

Doe d. Otley v. Manning is perhaps the highest authority, as well as the most unequivocal and decisive, on the question of 27 Eliz.; but confining the discussion now to the early cases, a very clear authority, though also relating to 27 Eliz., may be found in *Lavender v. Blackstone*, 2 Lev. 146 (1687). There, though a jury had, in a prior ejectment between the parties, found that a certain conveyance was not fraudulent, in a second ejectment the court pronounced it fraudulent as matter of law. The case — it deserves to be better known — was as follows: P, being heavily in debt, for which D was bound, levies a fine,

not joining his wife, in favor of D and another, in trust that at the request of D they should sell the lands, and pay off the debts for which D then was, or within fifteen years should become, bound for P, then all such damages as D should sustain thereby, and then such other debts as were due, and should be certified within a certain time; remainder, if any, to P, etc. Proviso (1) that P might make a jointure to his wife for life in £300 per year, (2) grant rent-charges to his younger children, (3) make leases, with consent of D and another, of all or any part of the lands for any number of years, with or without rent. A large part of the land was sold, and all the debts paid with proceeds. Afterwards P, being in possession of the residue (which the deed allowed, so long as he paid the interest), sold £400 per year by himself alone, and the purchaser enjoyed the same for many years without interruption by the trustees. Finally P mortgaged the land now in question, part of the lands above mentioned, to G who assigned to the defendant. P having died, his heir brings ejectment, and recovers, the jury finding the settlement *not* fraudulent; whereupon B brings ejectment on the ground that the settlement was fraudulent, and prevails, the jury being directed by the whole court of K. B. (Sir Matthew Hale, C. J. and others) to find the settlement fraudulent. 'For (1) the continuance of possession, and the sale of £400 per annum, by himself solely, notwithstanding the trustees joined in the sale of the other part, was a badge of fraud; (2) the proviso to make leases . . . puts it in his power to defeat the whole settlement . . .; (3) the wife did not join in the fine, and therefore continues dowable.'

In none of these cases, nor in any of the other early cases falling under § 1, *supra*, is there any suggestion that the

'intent' of the statutes is to be taken in the popular sense. The nearest approach to an exception is in the language of two or three cases of the time of Coke, as given in substance in *Kimpton v. St. Paul's Parish*, 2 Sess. Cas. 127 (1726): 'Fraud ought not to be conceived unless expressly found, for *frans est odiosa et non præsumenda*.' *Chancellor of Oxford's Case*, 10 Coke, 56; *Crisp v. Pratt*, Cro. Car. 549; *Lady Gorge's Case*, ib. 550. See also *Webb v. Worfield*, Bridgm. 110, 112; *Douglasse v. Waad*, 1 Cas. in Ch. 99, 100; *Bath's Case*, 3 Cas. in Ch. 55, 85, 114; *Terry v. Browne*, 1 Keb. 41; *Serjeant's Case*, 3 Leon. 253, 255. That however is familiar doctrine, and is entirely consistent with the meaning generally given to the word 'fraud.' (Of these 17th century cases only *Lady Gorge's Case* related to either of the statutes of Elizabeth; that case arose on 27th Eliz.) And that language would be perfectly true of transactions naturally or legally innocent on their face.

One more case may be specially noticed, *Harman v. Fishar*, Lofft, 472 (1773), a case of trover by assignees in bankruptcy suing to recover property which had been the subject of an honest preference on the eve of bankruptcy. Counsel for the plaintiffs, the prevailing side, in an argument reported at length, said: 'Judging fraud—I mean legal fraud, which, especially in bankruptcy cases, means an act *unwarranted* by law, to the prejudice of a *third* person, and not that crafty villany or grossness of deceit to which it is applied in common language—judging it by facts and circumstances, there is here an act delusory, at least, in its natural effect on the creditors, . . . just and fair indeed between the parties if they only had been concerned, but not warranted by law.' It is clear that the court (Lord

Mansfield was Chief Justice) acted upon that view of the matter. See very similar language in an opinion by Parker, C. J. for the court, in *Adams v. Paige*, 7 Pick. 542, next to last paragraph.

The foregoing are all the cases touching the meaning of 'intent to defraud' in the authorities down to the time of Lord Mansfield. From that time we are on familiar ground, and the later cases, which have already been referred to, need not be here repeated. The language used is almost everywhere to the same effect as that above given; indeed, apart from cases which would fall under § 2 of the text, there has never been any serious disposition to interpret the 'intent' of the statute literally from time when, in *Twyne's Case*, the rule was laid down, that the statute was to be interpreted liberally, for the suppression of fraud. That famous case is throughout the great authority.

The list of early cases relating to the statutes of Elizabeth will be made substantially complete by adding to the foregoing the following, few of which however throw much light upon this subject: *Dyer*, 294 b, in the year of the statute, post, p. 395; *Burg's Case*, Moore, 602 (27 Eliz.); *Bullock v. Thorne*, ib. 615 (same); *Sheldon v. Handbury*, ib. 757 (same); *Burrel's Case*, 6 Coke, 72 (same); *Kitchin v. Dixon*, Gouldsb. 116; *Price v. Sands*, ib. 118 (27 Eliz.); *Gewen v. Roll*, Croke Jac. 131 (same); *Scot v. Bell*, 2 Lev. 70 (same); *White v. Stringer*, ib. 105 (same); *Smartle v. Williams*, 3 Lev. 387 (same); *Hamberton v. Howgil*, Hob. 72 b; s. c. Jenk. Cent. 295; *Yate's Case*, Godb. 284; *Wilson's Case*, ib. 161; *Smith v. Wheeler*, 1 Mod. 16 and 38; *Bateman's Case*, ib. 76; *Butler v. Waterhouse*, 2 Show. 46 (27 Eliz. c. 4); *Hawes v. Loader*, Yelv. 196; s. c. Cro. Jac. 270; *Paston v. Lea*, Palmer, 414, ante, p. 89; *Stowel v. Zouch*, Ander-

son, 172; *Naylor v. Baldwin*, 1 Rep. in Ch. 69; *Leach v. Dean*, ib. 78 (27 Eliz.); *Laughton v. Tracy*, 2 Rep. in Ch. 16; *Holford v. Holford*, 1 Cas. in Ch. 216 (27 Eliz.); *Gardiner v. Painter*, Cas. t. King, 65 (same); *Parker v. Serjeant*, Rep. t. Finch, 146 (same); *Oakover v. Pettua*, ib. 270; *Draper v. Dean*, ib. 439; *Brown v. Stebbing*, ib. 449; *Jenkins v. Kemishe*, Hardr. 395 (27 Eliz.); *Buller v. Waterhouse*, T. Jones 94 (same); *Le Strange v. Temple*, 1 Keb. 357 (same); *Miles v. Williams*, Lucas, 243, 247; *Tucker v. Cosh*, Style, 288 (Bankruptcy Act, 1 Jac. 1); *Cotterell v. Purchase*, Cas. t. Talb. 61, 63, 64 (mortgage by way of absolute deed, with separate defeasance, 'will always appear with a face of fraud'); *Porter v. Clinton*, Comb. 222; *Astley v. Child*, Holt, 327; *Sanders's Case*, ib. 327 and 398; *Newport's Case*, ib. 477 (27 Eliz.); *Banbury's Case*, Freem. Ch. 8 (27 Eliz.); *Hangerford v. Earle*, ib. 120; s. c. 2 Vern. 261, ante, pp. 14, 312; *Fletcher v. Sedley*, 2 Vern. 490; *Tarback v. Marbury*, ib. 510, ante, p. 90; *Horn v. Horn*, 1 Amb. 79, ante, p. 71; *Partridge v. Gopp*, 2 Amb. 696; s. c. 1 Eden, 163, ante, p. 70; *Crisp v. Pratt*, Croke Ch. 548, ante, p. 93; *White v. Hussey*, Prec. Ch. 13 (27 Eliz.); *Thompson v. Towne*, ib. 52; *Lewkner v. Freeman*, ib. 105, ante, p. 90; *Lassels v. Cornwallis*, ib. 232; *Kirk v. Clark*, ib. 275; s. c. 3 Salk. 174; *Bucknal v. Roiston*, Prec. Ch. 285; *Loeffes v. Lewen*, ib. 370; *East India Co. v. Clavel*, ib. 377; *Brunsdon v. Stratton*, ib. 520; s. c. 3 Salk. 174; *White v. Thornborough*, Prec. Ch. 425; s. c. 3

Salk. 174; *Duffin v. Furness*, Sel. Cas. in Ch. 77; s. c. 2 Eq. Cas. Abr. 483; *Tomkins v. Ennis*, 1 Eq. Cas. Abr. 334 (27 Eliz.); *Roe v. Mitton*, 2 Wils. 356 (same); *Russell v. Hammond*, West, 530; s. c. 1 Atk. 13, ante p. 92; *Walker v. Burrows*, 1 Atk. 93, ante, p. 91; *Ex parte Marsh*, ib. 158; *Newstead v. Searles*, ib. 265; *Ryall v. Rolle*, ib. 165; *Brinton v. Ward*, 2 Atk. 172; *Taylor v. Jones*, ib. 600, ante, p. 91; *Middleton v. Marlow*, ib. 519; *White v. Sansom*, 3 Atk. 410 (27 Eliz.), ante, p. 92; *Troughton v. Troughton*, ib. 656; *Underwood v. Hitchcox*, 1 Ves. 279, ante, p. 127; *Bennet v. Musgrove*, ib. 51; *Jenner v. Wilkins*, 3 Ves. 112; *Alden v. Gregory*, 2 Eden, 280 (27 Eliz.); *Kimpton v. St. Paul's Parish*, 2 Sess. Cas. 127; *Worseley v. De Mattos*, 1 Burr. 467 (Bankruptcy Act, 1 Jac. I.); *Foxcroft v. Devonshire*, 2 Burr. 931, 941 (same).

This list of seventy cases and more begins with a case contemporaneous with the statute of 13th Elizabeth (1570), and ends nearly two centuries later, in the time of Lord Mansfield (1764). Such of the cases as are of importance are considered in their proper place; most of them belong merely to history, though some might still be cited as authority if there were not later and better reported cases upon the same questions. They are cited in a body here, so that any who will may see how the courts construed or regarded the statutes in early times; though what there is on that subject will mostly be found in the early cases particularly noticed above.

CHAPTER XVI.

CONSEQUENCES OF PROOF OF INTENT.

§ 1. EXISTENCE OF OTHER PROPERTY.

WHAT legal consequences flow from proving that an alienation has been made with intent to hinder, delay, or defraud creditors? Allusion to such consequences has been made from time to time in the preceding pages, but that has been incidental; it is important now to consider the subject directly, and to ascertain as definitely as possible the nature and extent of the same.

The first fact to observe is that the statute of 13th Elizabeth, with its followers in this country, declares invalid alienations made simply with *intent* to defraud. Here is a striking difference between the statute and the law of deceit. Fraud attempted in this latter way does not come within the notice of the law, at least on its civil side, by reason merely of intent to defraud, however clear or bold; damage must be added.¹ But the statute of Elizabeth says nothing of damage; it declares the intent to defraud fatal to the alienation.²

Indeed it matters not, where personal intent to defraud is shown, that the fraudulent conveyance, if allowed to stand,

¹ Vol. 1, pp. 540-542.

² This distinction was overlooked in *Meyer v. Sulzbacker*, 76 Ala. 120, dictum. But the law of some of our states requires the creditor, in a suit in equity to set aside a fraudulent conveyance, to aver a deficiency of legal assets. *Ante*, p. 137. That rule however has nothing to do with other cases; it does not mean

that the statutes against fraudulent conveyances apply only to cases in which there is not still ample property of the debtor within the creditor's reach. Those statutes give the creditor the right to levy upon the very property which has been conveyed to hinder or defraud him, regardless of other property. *Wadsworth v. Williams*, 100 Mass. 126.

would not harm any one, by reason of the fact that the debtor has other property, ample in amount, within the reach of his creditors.¹ There has been, where the case is not a matter of statute, some confusion on this point, as we have pointed out on a preceding page,² growing out of an entirely distinct rule; a rule of courts of equity, that before their process is available to reach equitable assets of a debtor, it must appear that there is no remedy at law, that is, that there is no property of the debtor which can be attached or taken on execution by ordinary process. This doctrine, when applied to

¹ *Wadsworth v. Williams*, 100 Mass. 126; *Gormley v. Potter*, 29 Ohio St. 597; *Botsford v. Beers*, 11 Conn. 369; *Weightman v. Hatch*, 17 Ill. 281; *Yankee v. Sweeney*, 85 Ky. 55; *Vasser v. Henderson*, 40 Miss. 519; *Lehman v. Meyer*, 67 Ala. 396; *Hager v. Shindler*, 29 Cal. 47; *Wadsworth v. Schissebauer*, 32 Minn. 84; *Leonard v. Forcheimer*, 49 Ala. 145; *Sangster v. Gaither*, 3 Md. 40; *Inloes v. American Bank*, 11 Md. 173, 183; *Main v. Lynch*, 54 Md. 658; *Miller v. Dayton*, 47 Iowa, 312. See *Goodman v. Wineland*, 61 Md. 449, quoted, ante, pp. 80, 81, note. Statute has changed the rule in some states. See e. g. the statute of California, Civil Code, § 3441: 'A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement by legal process of his right to take the property affected by the transfer or obligation.' And quere as to the effect of fraud upon one distinct set of the creditors; can the others avail themselves of it? In *Powers v. Graydon*, 10 Bosw. 630, 645, Robertson, J. seems to think they cannot. But if the creditors affected were to proceed against the transaction and upset it, that would let all creditors in according to the general doctrine of equity; and that being the case the creditors

who were not intended by the fraud would have an equity, which they ought to be able to assert independently. Ante, pp. 89, 97. But it is not clear that that principle, applicable to the case of subsequent creditors, who may have everything at stake upon it, would be applied to such a case as that referred to in *Powers v. Graydon*.

A rule that may seem to militate against the text is, that intent to defraud in the case of the conveyance of exempt property cannot be made available by creditors (ante, pp. 51 et seq.); the reason sometimes given being that creditors cannot be injured by the conveyance. *Fellows v. Lewis*, 65 Ala. 343; *Paulk v. Wolfe*, 34 Ala. 541. But the true reason is, that there was nothing for the intent to operate upon; the statutes against fraudulent conveyances have not enlarged the rights of creditors. Ante, pp. 46, 59. So too collusion without damage (*Lamb v. Smith*, 132 Mass. 574) is a different thing, and may not be wrongful.

² Ante, p. 80, note, and cases there cited. The debtor may estop himself to say that he had other property which might have been taken, as by informing the officer that he has no property and inducing the officer so to return. *Lewis v. Lamphere*, 79 Ill. 187.

the present subject, bears, not upon ordinary attachments or executions, in the absence of special statute, but only upon cases in which the creditor has brought suit in equity to reach the property fraudulently conveyed by his debtor, as where the suit is to set aside the conveyance.

But as a new question, unaffected by statute, the doctrine is wrong. The statute of Elizabeth applies, so far as its language, our only guide, indicates, to all cases and to all courts;¹ the debtor remains the owner.² When a creditor finds it necessary to proceed in equity, his case, if really founded upon a conveyance made by his debtor in fraud of

¹ The conveyance is invalid at law as well as in equity; this distinction between fraudulent conveyances under the statute of Elizabeth and conveyances made or obtained by deception should not be overlooked. See *infra*, pp. 409-412. In Massachusetts, owing perhaps to confusion, this distinction does not prevail. Vol. 1, p. 46; *Bassett v. Brown*, 100 Mass. 355, holding conveyances of land obtained by fraudulent representations void at law.

That conveyances in fraud of creditors are invalid at law was held in the very year in which the statute of 13th Elizabeth was passed. *Dyer*, 294 b (names of parties not stated). Pending a suit, and to defraud the plaintiff of his execution, the defendant conveyed his lands by voluntary deed, and still took the profits thereof. The sheriff returned execution so stating, without a levy, and asked for directions; the old law not being thought clear. See *ante*, pp. 143, 144. Meantime the statute of 13th Eliz. having passed, a pluries execution was now awarded by the court, the statute having reference back to the beginning of the reign. But the judges were not agreed what should be done with the former writ and return.

² It has been supposed in some cases

that the debtor was, under the statute, a trustee *ex maleficio*. 'What then,' said Gibson, C. J. in *Englebert v. Blanjot*, 2 Whart. 240, 245, quoted in *Heath v. Page*, 63 Penn. St. 108, 'what then is the interest of the debtor in property fraudulently conveyed by him? As regards benefit to himself, absolutely nothing; but as regards benefit to those attempted to be defrauded, something tangible and substantial. For the benefit of these the ownership remains in him as a trustee *ex maleficio*. On no other principle could the legal title be sold, even on judicial process against him; yet it is constantly seized in execution and sold as his. The title remains in him so far as is necessary to protect the interest of his creditors.' But why call the debtor a trustee if the title remains in him? He stands towards the creditor as he stood before the conveyance, as owner of the property; and the property is taken accordingly. The fraudulent grantee is more like a trustee (*Heath v. Page*, *supra*, and *Ferguson v. Hillman*, 55 Wis. 181, as to proceeds of subsequent sale by such grantee), as in cases of deception; in regard to which latter cases see *Small v. Attwood*, *Younge*, 507; *Cheney v. Gleason*, 117 Mass. 557; vol. 1, p. 49.

creditors, is founded upon the statute of Elizabeth, and is not the technical proceeding, invented by equity, to reach equitable assets;¹ it only resembles that case, — ‘quod simile non est idem.’ Some of the courts, unwilling to defeat the statute against fraudulent conveyances, and yet under the influence apparently of the confusion referred to, or acting under statute, have stopped short with declaring that, before the creditor can have his debtor’s fraudulent conveyance set aside, he must have had execution issued; then suit in equity can be brought in aid of the execution.² But this is opposed to our statute; it should be enough to justify the action of equity, in the absence of other statute, that the creditor has obtained a lien upon the property fraudulently conveyed.³

The courts of one or two of the states proceed, in another particular, as if it were not fatal to a conveyance that it was made with intent to hinder, delay, or defraud, indeed even though there has been an actual delay of creditors, if still the result has not been to prevent them from reaching the property in question. Thus we have seen that according to Massachusetts law, where debtors’ rights have been much enlarged by the courts, an insolvent debtor may in an assignment for his creditors provide that dividends of the refusing creditors, or surplus in the case of a partial assignment, shall be paid back to the assignor, because creditors can still reach the fund to be paid back.⁴ This however is the result of the law’s abridgment of creditors’ rights, and is not to be taken as any part of the law against fraudulent conveyances in itself.⁵ And there are other cases of which the same might be said.⁶

¹ As to that sort of case see *Devine v. Harkness*, 117 Ill. 145; also ante, p. 80, note.

² *Adsit v. Butler*, 87 N. Y. 585. See *Mathews v. Mobile Ins. Co.* 75 Ala. 85. But see *Sharp v. Sharp*, 76 Ala. 812.

³ *Wadsworth v. Schisselbauer*, 82 Minn. 84, in which the subject is well considered. Ante, pp. 80, 137, note.

⁴ Ante, pp. 286–288.

⁵ Ante, p. 291.

⁶ Ante, pp. 288–291.

§ 2. PARTIAL VALIDITY OF CONVEYANCE: 'VOID AND VOIDABLE': IMPROVEMENTS: RENTS AND PROFITS.

In the next place what is the legal consequence of the *invalidity* of a conveyance, under the statute? The language of the statute of Elizabeth is very pointed in this particular; it declares the fraudulent conveyance and other enumerated things (including even judgments¹) 'to be clearly and utterly void, frustrate, and of none effect,' against the parties wronged. The statute in some of our states has similar language; that of Pennsylvania and that of South Carolina being precisely the same; that of Florida, declaring the conveyance 'to be utterly void, frustrate, and of none effect;' that of North Carolina and that of New Jersey, 'to be utterly void and of no effect;' that of Ohio, 'to be void and of no effect;' that of Mississippi and that of Rhode Island, 'to be clearly and utterly void;' that of Vermont, to 'be utterly void,' and to 'be null and void.' But the statute in most of the states merely declares the conveyance 'void.' This language must however be taken in connection with the saving, in the statutes generally, of purchasers for valuable consideration in good faith. Still presumptively the statutes apply when the 'intent' is established on the part of the debtor.

That the language in question is not to be taken as widely true is clear from the fact (1) that the fraudulent conveyance is good between the parties, (2) that the grantee though a participant in the grantor's fraud can convey a good title to another, and (3) from the fact (soon to be commented upon) that the statute confers certain precedural rights against the debtor's grantee, which would not be needed if the conveyance were in all respects absolutely void. But for some special purposes the condemnatory language of the statutes has received full force. Participation by the alienee of property in the fraud of the debtor-alienor may furnish such a purpose.

¹ See ante, pp. 120, 139, note; post, p. 426.

A mortgage e. g. is made with 'intent' to defraud other creditors of the mortgagor, both parties actually participating in such intent, the mortgagee however becoming himself a real creditor,—or a mortgage is made covering property which is conveyed with 'intent' of both parties to defraud the mortgagor's other creditors, and certain other property is conveyed with it in good faith, to secure an honest debt due to the mortgagee; in each of these, and in all similar cases, the language of the statute has its full force, and the transaction is invalid entirely.¹ When attacked by a creditor, it will not stand as security for the sum really due,² or hold good in respect of the property not fraudulently included;³ assuming of course that the claimant was actually privy to the fraud of the debtor.⁴ 'Void,' in the language of the statute, in part, the transaction is void in the whole;⁵ though in some cases there may, it seems, be a severance, if easy, of valid from void.⁶

¹ *Holt v. Creamer*, 34 N. J. Eq. 181. The cases supposed are *new* debts.

² *Weeden v. Hawes*, 10 Conn. 50 ('where the statute makes a deed void for anything done against law, if any part of the consideration is against law the deed is entirely void'); *Holt v. Creamer*, 34 N. J. Eq. 181, 187; *Mead v. Combs*, 19 N. J. Eq. 12; *Sommerville v. Horton*, 4 Yerg. 541, 550; *Winsted v. Hulme*, 32 Kans. 568.

³ *Russell v. Winne*, 37 N. Y. 591.

⁴ *Beall v. Williamson*, 14 Ala. 55, 62; *Lyne v. Wann*, 72 Ala. 43, where the claimant was not privy to the fraud, and so did not come within the rule of the text. See also *Gordon v. Tweedy*, 71 Ala. 202; *Porter v. Gracie*, 58 Ala. 303.

⁵ Besides the foregoing cases see *Boyd v. Dunlap*, 1 Johns. Ch. 473; *Sands v. Codwise*, 4 Johns. 536; *Goodrich v. Downs*, 6 Hill, 439; *Grover v. Wakeman*, 11 Wend. 187, 194; *Fulton Bank v. Benedict*, 1 Hall, 480, 546; *Jackson*

v. Packard, 6 Wend. 415; *Rice v. Welling*, 5 Wend. 595; *Hammond v. Hopping*, 13 Wend. 505; *Loos v. Wilkinson*, 113 N. Y. 485; a. c. 110 N. Y. 195; *Davis v. Leopold*, 87 N. Y. 620; *Hentze v. Bentley*, 34 N. J. Eq. 562; *Muirhead v. Smith*, 35 N. J. Eq. 303; *Hubbard v. Allen*, 59 Ala. 283; *Campbell v. Davis*, 85 Ala. 56; *Caldwell v. King*, 76 Ala. 149; *Lobstein v. Lehn*, 190 Ill. 549; *Low v. Wortman*, 44 N. J. Eq. 193, 201; *Forniquet v. Forstall*, 34 Miss. 87; *Harmon v. Hoskins*, 56 Miss. 142, 149; *Black v. Vaughan*, 70 Texas, 47; *Horton v. Williams*, 21 Minn. 187, 192; *Ferguson v. Hillman*, 55 Wis. 181; *Seivers v. Dickover*, 101 Ind. 495; *McLean v. Letchford*, 60 Miss. 169; *Simmons v. Ingram*, ib. 886 (wife not entitled to dower); *Wallach v. Wylie*, 28 Kans. 138. And further as bearing upon this subject see *Young v. Ward*, 115 Ill. 264.

⁶ See *French v. French*, 5 De G. M. & G. 95.

This rule has been applied, and in principle rightly, in the case of absolute deeds recorded, but intended for mortgages; the deed not being allowed to stand against other creditors for the sum really due.¹ But the contrary has also been held.² It has also been decided that where two pieces of property are sold at the same time, to the same person, the sale of one may be fraudulent against creditors, while the sale of the other is valid, even though both pieces are conveyed by the same instrument.³ And so it has been decided of a conveyance made up of distinct and easily separable transactions, some fraudulent, some proper.⁴

There is no general rule however allowing severance upon any ground that it is practicable. Thus a particular clause in an assignment for creditors may annul the whole transaction regardless of the fact that it would be practicable to treat the clause separately and declare it void, leaving the rest to stand.⁵ In cases of separable parts the question concerning the objectionable feature appears ordinarily to be whether it indicates an intent to defraud in regard to the whole transaction, or that the intent is *manifestly* confined to some severable part. That is to say, the case should be a very clear one in which severance may be allowed; severance should not be lightly granted of a matter falling within the statutes against fraudulent conveyances.

This principle in regard to participation in fraud extends to alienations in favor of the grantor's wife, and is forcibly illustrated by a recent case⁶ of the kind. Land had been

¹ Campbell v. Davis, 85 Ala. 56; Caldwell v. King, 76 Ala. 149. See Levi v. Welsh, 45 N. J. Eq. 887.

² Hinkle v. Wilson, 53 Md. 287.

³ Scheble v. Jordan, 30 Kans. 353, sale of one piece absolutely, the other on trust for the vendor; Jaffrey v. McGough, 83 Ala. 202, conveyance to several grantees, for value as to some of them, held good so far.

⁴ Feldman v. Gamble, 26 N. J. Eq. 494. See further Donnell v. Byern, 69 Mo. 468; Thomson v. Hester, 55 Miss. 656, conveyance to wife partly valuable, partly voluntary, held good so far as valuable; Gilkey v. Pollock, 82 Ala. 503, to the same effect. See *infra*, p. 400.

⁵ Ante, chapter 11.

⁶ Davis v. Leopold, 87 N. Y. 620.

conveyed, through a third person, to the wife of the (first) grantor, in fraud of the husband's creditors, the wife participating. It was declared that the fraud rendered the transaction entirely void,¹ and hence that the conveyance could not stand in favor of the wife even to the extent of her pecuniary claims against the husband; such a deed, as Chancellor Kent had decided,² could not stand as a security for any purpose of reimbursement or indemnity. Nor could the wife claim any of the fruits of the cultivation of the land arising since the conveyance, such as hay cut.³

It is also held that the effect of the statute is to make a grantee who has actually participated in the fraud of the debtor-grantor liable for the rents of land conveyed, and by parity of reasoning a buyer of goods similarly situated would be liable for their use. This doctrine, so far as it relates to land, has lately been said to be favored by a sound public policy, which may well be believed, and also by a current of authorities approaching unanimity. 'It is the policy of the law to discourage fraud in all of its phases.'⁴ But a contrary doctrine has been laid down by some courts,⁵ unless the grantee holds by some secret trust for the grantor,⁶ a distinction not easily understood.

With regard to cases in which, as in the foregoing, the grantee is a participant or confederate with the grantor in the latter's attempt to defraud his creditors, there is little diffi-

¹ The court cited *Union Bank v. Brown v. McDonald*, 1 Hill Ch. (S. Car.) 297; *Strike's Case*, 1 Bland, 57; *Kipp v. Hanna*, 2 Bland, 26; *Ringgold v. Waggoner*, 14 Ark. 69. It is held in *Kitchell v. Jackson*, *supra*, that the time for estimating the rents and profits should begin with the service of summons. *Pharis v. Lechman*, 20 Ala. 662, 687; *Backhouse v. Jeft*, *supra*.

² *Boyd v. Dunlap*, 1 Johns. Ch. 478.

³ *Dodd v. Adams*, 125 Mass. 398. See *Stearns v. Herrick*, 132 Mass. 114.

⁴ *Kitchell v. Jackson*, 71 Ala. 556, overruling *Marshall v. Croom*, 60 Ala. 121. See *Sands v. Codwise*, 4 Johns. 536; also *Backhouse v. Jeft*, 1 Brock. 500; *Jones v. McLeod*, 61 Ga. 602;

⁵ *Robinson v. Stewart*, 10 N. Y. 189; *Simpson v. Simpson*, 7 Humph. 275.

⁶ *Robinson v. Stewart*, *supra*.

culty, unless it be in considering whether the fraud taints the whole transaction or only some severable part; but when we turn to cases in which the grantee (purchasing as a stranger, and not taking as a preferred creditor) has only taken with notice or with knowledge of the grantor's intent to defraud, the subject becomes perplexing. That is due mainly, it is apprehended, to confusing the position of the defrauding grantor with that of the grantee, or to assuming that the fraud of the former in some way passes to and affects the latter.

It seems to be supposed that where the property can be taken from the grantee, it is because of some sort of fraud in him; where he has not confederated or participated with the grantor, his conduct is to be treated as constructively fraudulent. But (so runs the argument) if the grantee is guilty of constructive fraud only, nothing can be taken from him beyond what he received from the grantor; the creditor cannot deprive him of the benefit of the improvements, accretions, and the like. There is nothing in the statutes however to justify treating this as a case of constructive fraud; nor is there anything in the taking of the property by the grantee to give countenance to the idea. The statutes merely invalidate conveyances made with intent to hinder, delay, or defraud creditors, saving bona fide purchasers for value. Purchase with notice cannot of itself be purchase with such intent; it would not be such (to recur to the doctrine of guilt in this work) in the average man.¹ Nor is any wrong done to creditors by the mere act of the grantee in taking, or in taking and improving or receiving additions to, the property; the wrong done to the creditor is done by the grantor, in attempting to defraud him. There is then nothing of fraud, or of the nature of fraud, in the grantee's

¹ To constitute fraud, as the author understands the term, the facts must be such that the average man would have intended deception or circumvention; imprudence or negligence in the average man would fall short of this.

taking the property ;¹ to speak of it as constructive fraud is to apply to it a misnomer ; the only proper name for it is purchase with notice.

But the conclusion to be drawn from this is not the conclusion commonly drawn from treating the act of the grantee as constructive fraud. The right of the grantee to the benefit of improvements and additions and the like is commonly treated as turning upon fraud ; and by treating purchase with notice or with knowledge as a matter of constructive fraud, the conclusion is reached that the grantee is entitled to make his claim for what he has added to the property. The truth appears to be that the case, instead of turning upon any notion of fraud, is simply a question of *title* ; the question is, to whom, as a mere matter of title, does the added value belong, to the creditor or to the grantee ? Ordinarily additions to property go with the property ; and on that footing the whole in the case under consideration would go to the creditor, to the extent of his demand, unless the grantee was misled. That appears to be the true view of the matter. The case bears a near analogy to improvements made, with notice, upon another man's estate ; these must be lost to him who made them, unless he was misled and induced by the owner of the estate to make them.²

The only effect of actual meditated fraud then on the part of the grantee is to show that he has not been misled ; he has made improvements and additions to the property, with full knowledge of the facts and has boldly taken the risk. It may well be declared therefore that a grantee, guilty of fraud with the grantor, cannot claim that the conveyance shall stand for any purpose until the creditor is satisfied ; not that the case is any the less one of title than where the grantee has only taken with notice, but that the question of title is put beyond dispute by the fraud.

Indeed almost the only case in which a grantee, not misled

¹ Vol. 1, p. 385.

² See Bigelow, Estoppel, 665, 5th ed.

by the creditor, can make a successful claim for improvements or the like is where he is a volunteer. Now the reason why a volunteer under a defrauding grantor cannot hold the property against the grantor's creditors is, not because he takes with notice, for he does not,¹ but simply because he has not paid value; that is, he is not within the statutory saving of persons taking for valuable consideration. It should follow that if the voluntary grantee has in point of fact taken without notice, actual or constructive, of the fraud, and has gone on, as any prudent man might do, and made improvements, or the like, he should be entitled to make claim for them, less the amount of rents and profits, against the grantor's creditors. And this has the support of authority.²

Is the grantee in other cases entitled to deduction for outlays? In a recent decision³ of the highest court of New York, in which the authorities are reviewed, it is concluded, against some dicta⁴ and one or two decisions⁵ to the contrary, that the grantee may deduct for taxes paid by him, for interest on mortgages, and for repairs necessary to the preservation of the estate; but no deduction can be allowed for the payment of premiums on insurance which could not inure to or was not adopted by the creditors. It follows that if the grantee can deduct for interest paid on mortgages, he can deduct for sums paid in the discharge of incumbrances themselves; that appears to stand upon a different footing from improvements and accretions.

Cases such as the foregoing, of improvements, additions, accretions, and the like, do not turn upon any language of

¹ Vol. 1, p. 403.

² See *Gilkey v. Pollock*, 82 Ala. 503; *Potter v. Gracie*, 58 Ala. 303; *Hubbard v. Allen*, 59 Ala. 283; *Borden v. Doughty*, 42 N. J. Eq. 314. See *Robinson v. Clark*, 76 Maine, 493. That rents and profits may be charged against the grantee see *Marshall v. Croom*, 60 Ala. 121; *Gordon v. Tweedy*, 74 Ala.

598; *Robinson v. Clark*, 76 Maine, 493; *Loos v. Wilkinson*, 113 N. Y. 485 (s. c. 110 N. Y. 195).

³ *Loos v. Wilkinson*, 113 N. Y. 485; s. c. 110 N. Y. 195.

⁴ *Wood v. Hunt*, 38 Barb. 302; *Thompson v. Bickford*, 19 Minn. 17; *Allen v. Berry*, 50 Mo. 90.

⁵ *Stoke's Case*, 1 Bland, 57.

the statutes, and are to be decided upon the doctrines of the common law especially as administered in equity. In that respect the question of the right of a purchaser with notice to make claim, or to have the conveyance stand as security, for moneys paid or advanced to the debtor, is quite different; this latter question turns upon the language of the statutes. The conveyance is declared to be void against creditors, save against bona fide purchasers for valuable consideration. But a purchaser with notice does not, according to the general American rule, fall within the saving;¹ and to say that he can claim, because he is really innocent of participation in the fraudulent act of the debtor, is entirely inconsistent with that rule, for his claim for money paid or advanced might equal the value of the property.

This inconsistency is sometimes overlooked, and the specious doctrine of constructive fraud invoked to protect the grantee. A common example arises in cases of advances for securing which the conveyance is made; if the grantee has not been guilty of actual fraud, it is said that he can insist that the conveyance shall stand in his favor to the extent of the advances.² So too it is sometimes held in cases of conveyances void against creditors on grounds of great inadequacy that the transaction may be treated as valid to the extent of the price paid.³ So also where property is fraudulently settled upon a wife by her husband, in consideration of her release of dower in certain land, the value of the dower interest being out of proportion to the value of the property settled, it has been declared that the value of that interest

¹ Chapter 19, § 1. Of course there can be no question of the kind where purchase with notice or knowledge is within the saving of the statute, as in Massachusetts; for there the conveyance itself is valid.

² See *Hinkle v. Wilson*, 53 Md. 287. Such a case is not preference, by which the party advancing the money could

hold the property conveyed notwithstanding the notice; preference applies to debts or claims previously created.

³ *Strong v. Lawrence*, 58 Iowa, 55, and cases cited; *Hershey v. Latham*, 46 Ark. 542; *Caldwell v. King*, 76 Ala. 149. See *Muirhead v. Smith*, 35 N. J. Eq. 308.

should be allowed by the husband's creditors in the impeachment of the settlement.¹

But such cases must be looked upon with distrust, if the statutes are to be administered according to their language. If the grantee falls without the saving of the law, he acquires nothing in the property, against the claims of creditors, however much he may have advanced. His only right will be against the grantor, on the footing, if creditors take the property, of an unsatisfied debt or demand, or of failure of consideration, or the like. And this is not only the meaning of the statutes, the public good requires it as well. The law should allow no opportunities for fraud; here if anywhere it should be applied searchingly so as to defeat every semblance of the subtle and dangerous wrong.

There has probably been a confusion in these matters of the provision of the statutes against fraudulent conveyances with the doctrine of equity applying to cases of misrepresentation; or rather the language of the statutes has probably been overlooked, and the doctrine of equity in regard to innocent misrepresentation applied. A conveyance of land may be rescinded by the vendor for an innocent misrepresentation by the purchaser;² and in such a case the purchaser, not being guilty of fraud, is entitled to have the conveyance stand as security for what he has paid and for what he has, by outlay, added to the value of the estate. That may well be treated as on the footing of constructive fraud.³

¹ Patrick v. Patrick, 87 Ill. 555. See Thomson v. Hester, 55 Miss. 656; Hershy v. Latham, 46 Ark. 542. It will no doubt be easier for a wife in such a case to show facts justifying her claim; but the general rule should be applied.

Where property bought by a wife, out of her own separate means, is by mistake conveyed to her and her husband jointly, and the husband makes sub-

stantial improvements out of *his* means, and then, being insolvent, corrects the mistake by conveying his title to his wife, the deed to the wife will justly stand to the extent of the wife's interest, that is, for all except the value of the improvements. Converse v. Hartley, 31 Conn. 372.

² Vol. 1, pp. 411, 412.

³ Vol. 1, pp. 427-430; McCaskey v. Graff, 23 Penn. St. 321.

On the other hand the grantee, whenever he must yield the property to the grantor's creditors, must, if necessary to satisfy their demands, account to them for the rents and profits, income, and the like of the estate, whether land or goods. That this is a sound proposition will be seen by observing that income-producing property as a thing of value consists, in ordinary cases, more of what it will produce in the way of income, than of the corpus itself. It will be seen more clearly still by supposing that the debtor fraudulently conveys the income of the property for a term of years to A, and the remainder to B, in which case of course A and B, if neither purchased for value in good faith, must alike yield to the grantor's creditors; the case could not be different then if the whole was conveyed to A. And it can obviously make no difference whether A is a volunteer¹ or has paid value participating in the fraud.²

It is doubtful whether the grantee should be chargeable with rents and profits which he did not receive and yet might by diligence have had; the debtor himself would not be bound to exert himself and earn money for his creditors. This however implies that the property did not in fact produce anything; if it did produce, it would require a strong case in favor of the grantor to exempt him from accounting; ordinarily it would be most suspicious that another had the benefit. Of course it could not help the grantee that he had consumed the profits; the *debtor* can consume the produce of the property in the reasonable support of himself and family, as property exempt, but the grantee is not the debtor.

§ 3. PURGING FRAUD.

In regard to other matters the language of the statutes has given rise to much discussion, and to some conflicting views.

¹ Robinson v. Clark, 76 Maine, 493 ;
supra, p. 403.

² Loos v. Wilkinson, 113 N. Y. 485 ;
s. c. 110 N. Y. 195.

Taken strictly, and one might suppose that Parliament intended the statute of Elizabeth so to be taken, the language would mean that there could be no help by subsequent action of the debtor for a case falling within the condemnation of the statute; and this interpretation has, to a certain extent, the sanction of Sir Edward Coke. Referring to the statute of 13th Elizabeth, Coke says that if there is fraud at the outset of a transaction, i. e. actual fraud, nothing afterwards can 'anyways salve and amend the matter.'¹ That is to say, in the language of later times, the fraud of the statute of Elizabeth cannot be purged. Whether and how far that is true in cases arising under the penal provisions of the statute we do not here inquire; the question here is of the civil administration of the law.

The rule of Coke however is not to be taken too broadly. It requires no citation of authority to show that a creditor who assents e. g. to an assignment by his debtor, containing a provision sufficient to avoid it as fraudulent, such as a trust for the debtor, is barred by his consent from raising objection afterwards to the assignment for any cause known to him when he assented. Indeed it is apprehended that Coke's rule was not intended to apply to cases of present or subsequent consent or ratification by the creditor; that the statute is not to be understood as making the transaction void in such a sense as to prevent subsequent recognition of it as binding;

¹ *Stone v. Grubham*, 2 Bulst. 225, quoted ante, p. 4, note; *American Bank v. Inloes*, 7 Md. 380; s. c. 11 Md. 73; *Bridges v. Hindes*, 16 Md. 101; *Gable v. Williams*, 59 Md. 46. See also the old view of purchase. *Preston v. Crofut*, 1 Day, 527, note; *Merrill v. Meachum*, 5 Day, 341; *Roberts v. Anderson*, 3 Johns. Ch. 371. But *Roberts v. Anderson* was reversed, 18 Johns. 515; and the Connecticut cases have generally been rejected. *Bean v. Smith*, 2 Mason, 252; *Oriental Bank v. Haskins*,

3 Met. 332; chap. 18. That however is only one phase of the question. 'After the fraud is detected and brought to light, the fraudulent vendor should not be allowed to compound the fraud by giving up a portion of the property or its avails, and being exempt from liability for another portion, although that [other] portion may have gone to pay bona fide debts.' *Samuels, J. in Williamson v. Goodwyn*, 9 Gratt. 503. See to the same effect *Smith v. Conkwright*, 28 Minn. 23.

and that the creditor's consent will always take away the taint.¹ 'Volenti non fit injuria.'

Another limitation of the rule must of necessity be allowed. to wit, where, after the conveyance has been made and before any steps have been taken against it by the creditor, a reconveyance is made; this is proper,² and there is nothing now for the statute to operate upon, considered civiliter.³ The same would be true if the grantee or mortgagee should repudiate the transaction entirely, and then obtain the property by lawful treaty.⁴

It is doubtful, as a matter of principle, whether 'purging fraud' can go beyond cases such as those above indicated; many courts refuse to allow the matter to go further.⁵ The

¹ See *Oriental Bank v. Haskins*, 3 Met. 382; *Russell v. Dudley*, ib. 147; *Lynde v. McGregor*, 18 Allen, 172, 181; *Millington v. Hill*, 47 Ark. 301; *Conkling v. Carson*, 11 Ill. 503; *Adlum v. Yard*, 1 Rawle, 163 (assignment); *Zuver v. Clark*, 104 Penn. St. 222; *Langudale v. Woollen*, 99 Ind. 575; *Second National Bank v. Brady*, 96 Ind. 498; *Hathaway v. Brown*, 22 Minn. 214; *Robbins v. Sackett*, 23 Kans. 301.

² *Carl v. Emery*, 148 Mass. 32; *Cramer v. Blood*, 48 N. Y. 684, affirming 57 Barb. 155; *Greenwood v. Marvin*, 111 N. Y. 423, fraudulent interalienation between partners rescinded before interference by creditors. But see *Keel v. Larkin*, 83 Ala. 142, at end of this chapter. After creditors' rights have attached, *secus*. *Sutherland v. Bradner*, 115 N. Y. 410; *Farrow v. Hayes*, 51 Md. 498; *Whitaker v. Williams*, 20 Conn. 98; *Whitaker v. Gavit*, 18 Conn. 522.

³ See *Second National Bank v. Brady*, and *Lynde v. McGregor*, ut supra. There would be no consideration for notes executed to give color for

the reconveyance. *Second National Bank v. Brady*.

⁴ *Pettes v. Dustin*, 58 N. H. 309; *First National Bank v. Anderson*, 24 Minn. 435; *Baldwin v. Flash*, 58 Miss. 593; *Brown v. Platt*, 8 Bosw. 324. But this should not be a mere colorable shift, by which the grantee or mortgagee attempts to change a fraudulent alienation into a valid one. *Blakeslee v. Rosaman*, 43 Wis. 127. *First National Bank v. Anderson*, supra, comes near to such a case.

⁵ *American Bank v. Inloes*, 7 Md. 380; s. c. 11 Md. 73; *Bridges v. Hindes*, 16 Md. 101; *Gable v. Williams*, 59 Md. 46; *Goodman v. Wine-land*, 61 Md. 449; *Stein v. Munch*, 24 Minn. 390; *Blakeslee v. Rosaman*, 44 Wis. 550; *Delaware v. Ensign*, 21 Barb. 85; *Janvrin v. Fogg*, 49 N. H. 340; *Beale v. Hall*, 22 Ga. 431; *Edwards v. Sonoma Bank*, 59 Cal. 148. See also *Sutherland v. Bradner*, 115 N. Y. 410.

But perhaps only the creditors upon whom fraud has been practised or attempted, where but part are subjects of it, as e. g. a class of preferred creditors

real effect of the statutes, under the general tenor of the decisions of the courts, is this: The statute, notwithstanding the strong language of the Legislature, is construed as falling short of making the fraudulent conveyance void in all respects; the grantee is deemed to have taken a title, but subject to the right of the creditor,¹ as far as may be necessary for the purpose of his demand, to levy execution upon the property directly, that is, without calling upon the courts specifically to annul the conveyance.² This, it seems, the creditor could not do but for the statutes; the very first case³ in the Reports, a case contemporaneous with the statute of 13th Elizabeth, and hence when the common law principle was fresh, indicates as much. Thus the statutes have conferred a distinctive right, it may be of very great

in an assignment, could upset the transaction. See *Powers v. Graydon*, 10 Bosw. 630, 645 et seq. *Robertson, J.* See ante, pp. 315, 394, note.

¹ The grantee has rights against the grantor's creditors; he may insist that they shall pursue their remedy according to law; and he may object to fraudulent execution sales, as e. g. where the property was sold at a grossly inadequate price. *Miller v. Koertge*, 70 Texas, 162. But see as to gross inadequacy at execution sale, *O'Callaghan v. O'Callaghan*, 9 Ill. 228. The grantee too may redeem after execution sale of the property, on the same footing upon which the grantor could have done so had not the fraudulent conveyance been made. *Sewall v. Sewall*, 139 Mass. 157; s. o. 130 Mass. 201.

² See e. g. *Scott v. Scott*, 85 Ky. 385. Hence a purchaser at execution sale can bring ejectment. *Flewelling v. Crane*, 58 Ala. 627. See *Carter v. Castlebury*, 5 Ala. 277. Where the debtor has bought property and had the title made to another, a different question

arises. See *Niver v. Crane*, 98 N. Y. 40; *Mulford v. Peterson*, 35 N. J. 127, 133; ante, pp. 123-127. In some states the right to levy upon property fraudulently conveyed is treated as given by special statutes. *Sherman v. Davis*, 137 Mass. 132. Where the grantee pays part of the purchase price, but for no distinct or specific interest, the property cannot be taken on execution by the creditors of the defrauding grantor, if the grantee was not privy to the fraud. *Snow v. Paine*, 114 Mass. 520.

³ *Dyer*, 294 b, 12 & 13 Eliz., partly before and partly after the statute. See ante, p. 395, note. The fact that a legal title is conferred upon the grantee shows this; and that a legal title is conferred is shown by the one fact (if there were no other) that the grantee, though taking in fraud, can himself pass a perfect title. If he took nothing whatever, he could pass nothing (except by estoppel upon himself). *Neal v. Gregory*, 19 Fla. 356.

value, though a procedural right, upon the creditor. The question then is, whether this right can be taken from the creditor, without his consent, except by some act which the law, by general agreement, such as sale to a bona fide purchaser for value,¹ treats as clearly valid.

Let the following case be supposed: A is creditor of B; B sells a horse to C, but retains possession, the transaction being in a state in which retaining possession makes a conclusive case of fraud, as in Connecticut. Can the right which the statute has conferred on A, to take the horse on execution, be taken away by B's delivering the horse to C, before A's levy and without A's consent? The cases² which have answered this question in the affirmative have not, it is believed, given full consideration to the fact that the statute has actually conferred rights upon A.³

Let another case be put: B, the debtor, makes a conveyance of land, fraudulent by reason of a particular provision, to C, who participates in the fraud; instead of obtaining a reconveyance from C,⁴ and then lawfully conveying the same land, B, with C's consent, but without consent of A, the creditor, cancels the objectionable provision. Will this make the conveyance good against A? It would not be difficult to

¹ This itself is sometimes spoken of as a purging of fraud. *Oriental Bank v. Haskins*, 3 Met. 332, 340; *Johnson v. Gibson*, 116 Ill. 294. But if the property come back again into the hands of the first grantee, who could not hold it, the old taint attaches again. *Johnson v. Gibson*, supra; 2 *Pomeroy's Equity*, § 754; *Allison v. Hagan*, 12 Nev. 38.

² *Gibbert v. Decker*, 53 Conn. 401, and cases cited for and against that decision. See ante, p. 339, note. *Carpenter v. Mayer*, 5 Watts, 483, *Gardiner v. Tubbs*, 21 Wend. 169, and other cases there cited, support the text; but they are denied in *Gibbert v. Decker*.

³ *Edwards v. Sonoma Bank*, 59 Cal. 148.

⁴ Supra, p. 408. Where a person summoned in as trustee (garnishee) has received property under circumstances indicative of fraud, such as to fix him with the character of trustee, but before service on him he has paid debts of the principal equal to the value of the goods, it is held that he is entitled to a discharge; the fraud has been purged. *Thomas v. Goodwin*, 12 Mass. 140; *Hutchins v. Sprague*, 4 N. H. 469; *Oriental Bank v. Haskins*, 3 Met. 332, 340.

answer this in the affirmative if no rights were conferred by the statute upon or have otherwise been acquired by¹ A, and if the original conveyance were absolutely void; for then the subsequent act of cancellation and delivering the deed in the new form might be treated as a fresh and lawful alienation,² an alienation at the worst in which a mistake had been corrected. But under the statute A acquired the valuable right of levying upon that land; and that right none should be allowed to take from him without his consent, except in a way admittedly proper.³ Besides, the case is a conveyance of land, which must be by deed recorded; and if so effected in fact, the title passed to the grantee, and could not be passed back except by deed recorded,⁴ — cancellation

¹ *Sutherland v. Bradner*, 115 N. Y. 410.

² *Comp. Rowley v. Rice*, 11 Met. 333, where it is declared in regard to a mortgage, objectionable only upon the ground that it is intended to cover after-acquired property, that it may not be necessary that a new act should be done when the property is acquired, further than for the mortgagee to take possession in accordance with a power in the mortgage. Such taking possession will itself, it is held, make the mortgage effective, as to the new property, against third persons claiming by later attachment or conveyance. *Deering v. Cobb*, 74 Maine, 332, citing *Hope v. Hayley*, 5 El. & B. 830; *Moody v. Wright*, 13 Met. 17, 32; *Chase v. Denny*, 130 Mass. 566; *Cook v. Corthell*, 11 R. I. 483; *Walker v. Vaughn*, 33 Conn. 577, 583; *Jones, Chattel Mortgages*, §§ 160, 167. Indeed equity would specifically enforce the mortgage in respect of the new property, as soon as acquired, if it has been sufficiently described. *Holroyd v. Marshall*, 10 H. L. Cas. 191, 211, Lord Westbury.

But such a case is not a case of fraud; the only ground of objection (and that, at law) to a mortgage of identified property not yet acquired is that the deed has, as to such property, nothing to operate upon. One cannot convey what one has not. (A general covenant of warranty in the case of land would make the warranty good at law; probably also in the case of personality. *Bigelow, Estoppel*, 412 (land), 446 (personalty), 5th ed.) To validate a fraudulent mortgage of existing property is a different thing; that should require the consent of the person upon whom the fraud was practised.

³ *Gable v. Williams*, 59 Md. 46; *Carll v. Emery*, 148 Mass. 32.

⁴ *Trull v. Skinner*, 17 Pick. 213, 215; *Smith v. Cockrell*, 66 Ala. 64; *Kimball v. Greig*, 47 Ala. 230; *Dukes v. Spangler*, 35 Ohio St. 119; *Jeffers v. Philo*, ib. 173. But between the parties the transaction may work an estoppel. *Trull v. Skinner*, supra. *Bigelow, Estoppel*, 578, 5th ed. See also *Tyler v. Tyler*, 126 Ill. 525. On the right of a grantee to reconvey see end of this chapter.

would not meet the requirement of the law,¹ regardless of the question of rights conferred by the statute. And further, cancellation would not affect the registry; which is the real evidence of title, as to third persons.

The last consideration would not apply to the case of a conveyance of chattels not requiring registration; and it may be urged that in such cases, assuming that all persons who were or have since become parties to the transaction, agree to have the objectionable clause cancelled and do cancel it, the fact that the statutes have given no more than a procedural right² should not debar the parties from undoing the mischief in the shortest way. This is an argument from justice, which indeed, at bottom, is the real argument in all these cases of attempted purging of fraud. But it will be observed that the case does not concern the debtor, for whom sympathy is sometimes awakened. It is a contest between creditors trying to outrun each other, or between a creditor and a purchaser; in the first of which cases the creditors are all alike unsecured (a lien creditor could look on unconcerned),³ and hence on a common footing of right; in the second of the cases the purchaser is in substantially the same situation, since he is not a bona fide purchaser for value. Under these circumstances the creditor who stands upon the statute against fraud may well be preferred to a person who is either a wrongdoer or at best but a volunteer; for the result, according to familiar doctrines of equity, will be to preserve that equality between the unsecured creditors which is justice; the creditor-under-the-statute, by prevailing, will, in the ordinary case of an insolvency, bring the fund into court

¹ *Respass v. Jones*, 102 N. Car. 5. upon the creditors any substantive rights in the property. *Anta*, pp. 46, 47, held, may change the deed at will. *Ib.*; 59, 60, 65; *Moore v. Bease*, 43 Cal. 511. *Davis v. Inscoc*, 84 N. Car. 396. Sed 511.

quere if the deed, being duly delivered, was fraudulent against creditors.

² So far as his lien extended; beyond that he would be on a level with the rest, and entitled to no advantage.

³ The statutes have not conferred

for equal distribution among all the creditors, the grantee the debtor, though guilty, it may be, of fraud, still being entitled to his share.¹ On the whole it is difficult to sustain the doctrine of purging fraud, in its ordinary manifestation and it is better to leave the parties to the unlawful transaction in the meshes of their own net.²

The conclusion here reached has been fully maintained by not a few well-considered decisions;³ most of them being in cases of the mortgage of goods in trade, in which the mortgage, or a contemporaneous oral agreement or understanding has given to the mortgagor the right to retain and use the property for his own purposes; in this state of things the mortgagor at some later time, before levy by other creditors turning the property over to the mortgagee without reserve. But there are other decisions which have declared that such act purges the fraud.⁴ In cases in which there arises not more than a prima facie presumption of fraud, as where apart from statute, a mortgage of goods gives to the mortgagor the right of possession, it is generally held that the presumed fraud may be purged by surrender of possession to the

¹ Ante, pp. 89, 97, 98, 104. See *Alabama Warehouse Co. v. Jones*, 62 Ala. 550. The rule is otherwise by statute in some states, at least as to subsequent creditors; and in some it may have been overlooked. See *Todd v. Neal*, 49 Ala. 266.

² In *Goodman v. Wineland*, 61 Md. 449, it accordingly was held that a voluntary conveyance, invalid against creditors when made, would not become valid by subsequent appreciation in the value of the debtor's property. 'The jurisdiction of a court of equity thus established is not thereafter contingent upon the fluctuation that may attend the value of the grantor's property. Otherwise the creditor from day to day might in turn have, lose, and regain his right to proceed.' But it was added

that if it appeared at the time of filing the bill the debtor had become abundantly able to make the gift, the court might so frame its decree as to save the property to the grantee, while securing the creditor at the same time. See ante, p. 81, note.

³ *Blakeslee v. Rossman*, 44 Wis. 550; s. c. 43 Wis. 116; *Stein v. Munch*, 24 Minn. 390; *Delaware v. Ensign*, 21 Barb. 85; *Janvrin v. Fogg*, 49 N. H. 340; *Edwards v. Sonoma Bank*, 59 Cal. 148. See also *Watson v. Rogers*, 53 Cal. 401; *Franklin v. Gummersell*, 9 Mo. App. 84.

⁴ *First National Bank v. Anderson*, 24 Minn. 435 (perhaps not opposed to *Stein v. Munch*, supra); *Read v. Wilson*, 22 Ill. 377; *Brown v. Webb*, 20 Ohio, 389. Further see ante, p. 251.

mortgagee before proceedings by other creditors.¹ It would perhaps be thought to be pressing the matter too far to apply the foregoing considerations against purging fraud to that case. But even in such a case if creditors have acquired specific rights since the transaction, as by judgment lien upon the property, it seems that the fraud could not be purged without their consent.²

§ 4. FRAUD BY MISREPRESENTATION DISTINGUISHED: 'VOID AND VOIDABLE.'

There is an important distinction between the effect of fraud under the statute of Elizabeth and its American counterparts and fraud in the way of fraudulent representations; a fraudulent conveyance effected under the last-named influence is not the same thing, either in form or in effect, as a fraudulent conveyance under the statute of Elizabeth. The former is ordinarily voidable only;³ the statute declares the latter to be void. Now it is true that the term 'void' in the statute is constantly construed as having the sense of 'voidable;' but that is for certain purposes only, not for all purposes. And that we have seen.

The distinction between fraud under the statute and fraud in the way of deception is however an example of the familiar but misleading rule that, while statute may render a transaction void for fraud, the common law renders transactions tainted with fraud voidable only; but that rule, at all events when so stated, turns upon an accident. The frauds with which the common law has to deal are generally cases of 'deception,' in the sense in which that term is used in this

¹ *Adams v. Wheeler*, 10 Pick. 199; 441, affirmed 9 N. Y. 142; *Gates v. Bartlett v. Williams*, 1 Pick. 288; ante, Andrews, 37 N. Y. 657; *Schwartz v. Soutter*, 41 Hun, 323, affirmed 103

² That is clearly true where the transaction was fraudulent per se. N. Y. 683; *Farrow v. Hayes*, 51 Md. 498; *Whitaker v. Williams*, 20 Conn. 98; *Whitaker v. Gavit*, 18 Conn. 522. Sutherland v. Bradner, 115 N. Y. 415, citing *Foster v. Williams*, 5 How. Pr. 5 Vol. 1, p. 617.

book, i. e. in contracts, sales, and the like between the-defrauding and the defrauded party. In these cases there is ordinarily a union of minds, and therefore a contract or a sale; and the fraud has the effect only of giving to the defrauded party a right of rescission.¹ But fraud may go deeper than this, and prevent the creation of any agreement; in which case the common law will pronounce just as strongly as could any statute.²

In regard to questions touching 'circumvention' however, such as cases like those contemplated by the statute of the 13th Elizabeth, it is not clear whether there is any difference between the effect of the statute and the common law; a matter to which a moment's attention may in this connection justly be given. The statute makes a conveyance falling within its meaning really 'void' for some purposes; thus it is not necessary for the creditor to go into equity, unless other facts require, to set aside the conveyance; against the creditor the conveyance is inoperative, to the extent of his claim; he may levy directly.³ In a case of the sort however, falling just without the terms of the statutes and so within common law principles, is the doctrine that the statute of Elizabeth is an affirmance of the common law an expression of the rule governing the case? There is no reason in the

¹ Vol. 1, p. 73.

² Vol. 1, pp. 617 et seq.

³ See e. g. Dyer, 294 b, same year as the stat. of 13 Eliz.; Doe d. Grimsby v. Ball, 11 Mees. & W. 531; Saxton v. Conny, 8 L. R. Ir. 216; Campbell v. Jones, 25 Minn. 155; Partee v. Mathews, 53 Miss. 140; Pierce v. Hill, 35 Mich. 194; Knox v. McFarren, 4 Colo. 586; Jacoby's Appeal, 67 Penn. St. 434; Pettus v. Glover, 68 Ala. 417; Ryland v. Callison, 54 Mo. 513; Russell v. Dyer, 33 N. H. 186; Fowler v. Trebein, 16 Ohio St. 493; Jackson v. Myers, 11 Wend. 535.

This right is given by special statute in some states. *Hanna v. Aebker*, 84 Ind. 411. The creditor may first take the property on execution at law and then go into equity, and have the title quieted if necessary. *Howland v. Knox*, 59 Iowa, 46; *Lionberger v. Baker*, 88 Mo. 447. Or he may at the outset have the deed set aside and the land subjected to payment. *Lionberger v. Baker* and *Partee v. Mathews*, supra.

The rule of the text does not prevail in Louisiana. *Yocum v. Bullit*, 6 Mart. N. S. 137. See s. c. 17 Am. Dec. 187, and note.

nature of things why it should not be so. This is not a case of a transaction between the party defrauding and the party defrauded, of which, accordingly, it could be said that there has been a union of minds; the creditor has never even presumptively bargained away his right to look to the property.

There is however some reference to a distinction between the statute and the common law in a case¹ of importance in New York, in which partnership effects of an insolvent firm had been assigned with preference of private debts due by one of the partners. The Supreme Court of the state had taken the position that this violated no statute, but only a principle of the common law (that partnership creditors have priority over private creditors), and therefore that the assignment as a whole was not invalidated. But the Court of Appeals, not denying the validity of such a distinction in itself, held that the provision was a violation of the statute against fraudulent conveyances.²

§ 5. MERGER.

The statute is not to be treated as penal, in its civil administration; hence as we have seen debtors are not to be deprived of the benefit of the exemption laws because they have conveyed exempt property with intent to defraud.³ Nor can the doctrine of merger be invoked by creditors who have shown that the conveyance in question was made with intent to defraud, so as to connect with the estate conveyed another estate already in the grantee and not affected with the taint; though for other purposes the two estates might merge into one. Thus a husband conveys to his wife in fee a piece of

¹ *Wilson v. Robertson*, 21 N. Y. 587. therefore be said to be made in trust for the use of one of the assignors.'

² It was also deemed to come within 2 R. S. 135, § 1. 'The assignment is made for the benefit of Crocker, as its purpose is to liquidate and discharge his individual debts. The transfer may Wright, J. at p. 589. The statute referred to is the ancient act of 3 Hen. VII. c. 4, as adopted in New York. See ante, pp. 22, 208.

³ Ante, pp. 51 et seq.

land, in fraud of his creditors, the wife being a volunteer or participating in the fraud; the wife's dower does not now merge with the larger estate conveyed to her, for the purposes of the husband's creditors, so as to enable them to take the whole.¹

§ 6. CONVEYANCES GOOD INTER PARTES.

The statutes, as we have seen, invalidate the fraudulent alienation only for the purposes of the creditors; so they declare in terms, and so the courts have time and again declared.² Long ago Sir Wm. Grant said of a marriage settlement made in fraud of creditors, that the deed was void only against creditors; it was only to the extent to which it might be necessary to go for their satisfaction that the deed was to be treated as if it had not been made. To every other purpose it was good; 'satisfy the creditors, and the settlement stands.'³ Of course the statute itself has no effect upon executory contracts touching the fraudulent conveyance, between the parties to the same, such as colorable notes given for purchase-price;⁴ but it seems that when the property fraudu-

¹ *Malloney v. Horan*, 49 N. Y. 111. Folger, J. : When 'the deed has been avoided by the court, and the property restored for the benefit of creditors, the further penalty will not be inflicted of the loss of another interest upon the ground of a merger. *Roberts v. Jackson*, 1 Wend. 478.'

² See the collection of cases on p. 68, nota. Further, *Zuver v. Clark*, 104 Penn. St. 222; *Haak's Appeal*, 100 Penn. St. 59; *Gill v. Henry*, 95 Penn. St. 388; *Harris v. Harris*, 23 Gratt. 737; *Roberts v. Lund*, 45 Vt. 82; *Horn v. Star Foundry Co.* 23 W. Va. 522; *Davy v. Kelley*, 66 Wis. 452; *Butler v. Moore*, 73 Maine, 151; *Beebe v. Saulter*, 87 Ill. 518; *Douglass v. Dunlap*, 10 Ohio, 162; *Gary v. Jacob-*

son, 55 Miss. 204; *Sewall v. Sewall*, 139 Mass. 157; s. c. 130 Mass. 201, allowing the grantee to redeem after execution sale, as the grantor might have done if no conveyance had been made.

³ *Curtis v. Price*, 12 Ves. 103, 106, ante, p. 68, note; *Allen v. Ashley School Fund*, 102 Mass. 262.

⁴ The courts generally hold such agreements binding, if the plaintiff does not find it necessary to show the fraud in his declaration. Vol. 1, p. 206; *Swan v. Scott*, 11 Serg. & R. 164; *Evans v. Dravo*, 24 Penn. St. 62; *Carpenter v. McClure*, 39 Vt. 9; *Davis v. Mitchell*, 34 Cal. 81; *Dyer v. Homer*, 22 Pick. 253; *Harvey v. Varney*, 98 Mass. 118; *Davy v. Kelley*, 66 Wis. 452; *Begbie v. Phosphate Sewage Co.*

lently conveyed is taken and appropriated entirely to the payment of creditors, there is a failure of consideration for any actual or colorable promise to pay by the grantee, so that he can defend suit for the price.¹

§ 7. DOWER.

What will be the effect of the success of the creditor in impeaching a conveyance of land by his debtor, with release of dower, upon the right of dower—a question already considered in another connection? It has been held that this right is now revived, on the ground that the grant itself has failed.² But it is, or may be, a mistake to say that the grant has failed; the grant is good, subject only to the creditor's right of satisfying his debt.³ Now the creditor cannot have satisfaction of the husband's debt out of the wife's estate;⁴ the wife's release of dower must therefore remain good to the grantee, though all the rest of the estate be taken by the creditor. The wife's release of dower does not, it is true, operate at common law by way of grant; but it does operate by way of estoppel upon her, which is equally effectual.⁵ This supposes that the grantee has practised no fraud or other wrong touching the conveyance.⁶

§ 8. LIEN CREDITORS.

The statute, in rendering void a conveyance, renders it void in favor of those creditors who have no lien (except such as may be created by a judgment or by return of execution unsatisfied) upon the property; towards a creditor who is fully secured by a lien upon it the statute against fraudulent con-

L. R. 10 Q. B. 491; *a. c.* 1 Q. B. D. 679. But see *Davis v. Sittig*, 65 Texas, 497, denying several of these cases.

¹ *Dyer v. Homer*, *supra*.

² *Bohannon v. Combs*, 97 Mo. 446; *Lockett v. James*, 8 Bush, 28; *Woodworth v. Paige*, 5 Ohio St. 70.

³ *Ante*, p. 68.

⁴ Of course therefore the widow of the grantor will prevail on the question of dower over any claim of creditors of the husband. *Ante*, p. 66.

⁵ See *ante*, pp. 65-68.

⁶ *Ante*, p. 67.

veyances is apparently unnecessary, and it is held in England and in this country to be inoperative.¹ That is to say, the fraudulent conveyance is good against the holder of the lien; the lien binding the property of course in the hands of the grantee, and of all subsequent holders.² The consequence of this doctrine is that upon a fraudulent conveyance of the property the lien creditor must treat the conveyance as valid, while the general creditors may treat it as invalid, and can exclude the lien creditor from participating in the proceeds of the sale;³ so if the property is sold to satisfy the lien, the buyer must admit the validity of the debtor's conveyance; while if it is sold under execution on behalf of a general creditor, the buyer acquires the right to avoid the conveyance.⁴ Again the lien would hold even against a bona fide purchaser for value, while such a purchaser would take the property clear of the claims of the general creditors. Of course the sale, whether by the lien creditor or by a general creditor, in no way disturbs prior valid liens.⁵

§ 9. FOLLOWING FUNDS.

Another consequence of establishing the fraudulent intent is that the property can be followed in the hands of all vol-

¹ Ante, p. 164; *George v. Milbanke*, 9 Ves. 190, 196; *Harman v. Richards*, 10 Hare, 81; *Zuver v. Clark*, 104 Penn. St. 222; *Haak's Appeal*, 100 Penn. St. 59; *Armington v. Rau*, ib. 168; *Fisher's Appeal*, 33 Penn. St. 294; *Byrod's Appeal*, 31 Penn. St. 241; *McMinn v. Whelan*, 27 Cal. 300. *Trunkey, J.* in *Armington v. Rau*: 'Haak's Appeal . . . was governed by the controlling principle in this case, namely, a prior lien creditor cannot question the validity of his debtor's conveyance. This is plain from the terms of the statute relating to fraudulent conveyances, and accords with the decisions in Pennsylvania. The debtor conveys subject to the lien. He has a right, upon such condition, to

sell or give away his land, and if he does so fraudulently the grantee's title is good against all the world except creditors and persons intended to be hindered, delayed, or defrauded. A prior lien creditor is not such a person.' Compare *Mathews v. Mobile Ins. Co.* 75 Ala. 85.

² *Haak's Appeal*, supra.

³ *Haak's Appeal*, supra; *Byrod's Appeal*, supra; *Fisher's Appeal*, supra; *Hoffman's Appeal*, supra; *Dungan's Appeal*, 88 Penn. St. 414.

⁴ *Zuver v. Clark*, supra; *Jacoby's Appeal*, 67 Penn. St. 434; *Hoffman's Appeal*, 44 Penn. St. 95.

⁵ Cases in note 3.

unteers, such as grantees without valuable consideration,¹ their or the debtor's heirs, distributees, legatees, devisees, and the like,² and volunteers under *them*,³ and of purchasers with notice (participation as distinguished from notice is required against purchasers for value in some states⁴), and that the proceeds of sale, of whatever kind, received from a bona fide purchaser for value can be taken, with perhaps a single exception, in the hands of the same persons.⁵ Nor has the

¹ *Chamberlin v. Jones*, 114 Ind. 458. E. g. executors or trustees of the debtor. *Doe v. Fallows*, 2 Tyrwh. 460.

² For a special case see *Jones v. McCleod*, 61 Ga. 602, where a creditor of his deceased debtor called to account one who, since the death, had been taking the rents and profits of land fraudulently conveyed by the debtor.

³ *New v. Oldfield*, 110 Ill. 138; *Keller v. Berry*, 62 Cal. 488; *Gooch's Case*, 5 Coke, 60; *Apharry v. Bodingham*, 1 Croke Eliz. 350. But not against purchasers for value without notice, as e. g. under antenuptial marriage settlement. *Richardson v. Horton*, 7 Beav. 112, 124; *Mathews v. Jones*, 2 Anstr. 506; *Spackman v. Timbrell*, 8 Sim. 260; *Dilkes v. Broadmead*, 2 De G. F. & J. 566. See also *Chapman v. Bradley*, 33 Beav. 61; s. c. 4 De G. J. & S. 71; *Coulson v. Alison*, 2 Giff. 279; s. c. 2 De G. F. & J. 521, marriage not have followed, and consideration therefore failing. May, *Fraudulent Conveyances*, 333, 334, 2d ed. It makes no difference how many successive volunteers or purchasers with notice there may be. *Phillips v. Adair*, 59 Ga. 371; *New v. Oldfield*, 110 Ill. 138. The creditors can follow the property until it reaches the hands of a purchaser for value in good faith.

But if the property find its way back again to the debtor's grantee, who could not hold it, he cannot hold it now

against the creditors though he receive it from a bona fide purchaser for value.

Johnson v. Gibson, 116 Ill. 294; 2 *Pomeroy*, Equity, § 754; *Allison v. Hagan*, 12 Nev. 38.

⁴ *Hill v. Ahern*, 135 Mass. 158; vol. 1, pp. 60, 131, 386.

⁵ *Heath v. Page*, 63 Penn. St. 108; *Ferguson v. Hillman*, 55 Wis. 181; *La Crosse Bank v. Wilson*, 74 Wis. 391; *O'Connor v. Boylan*, 49 Mich. 209; *Sloan v. Torry*, 78 Mo. 623; *Bernheim v. Beer*, 56 Miss. 149; *Mechanics' Ins. Co. v. Gerson*, 38 La. An. 310; *Weil v. Lapeyre*, ib. 303; *Swinford v. Rogers*, 23 Cal. 233; *Reeg v. Burnham*, 55 Mich. 39; *Smith v. Sands*, 17 Neb. 498; *Risser v. Rathburn*, 71 Iowa, 113. *Agnew, J.* in *Heath v. Page*: 'As the case stood at the service of the attachment, J H held the proceeds of the sale to M, which alone can represent the title that E H had in the premises; and if by reason of the fraudulent conveyance and the subsequent conversion of the land into money by a sale to a bona fide purchaser the money cannot be followed, the creditors of E H are balked by the fraud, and the statute of 13th Elizabeth rendered abortive. But this is a consequence not to be tolerated, while the only fund representing E H's interest remains in the hands of a mere volunteer.'

This rule applies as well to conveyances made by a third person with the

grantee in fraud any equity in respect of payments made by him in the purchase of the property;¹ as has already been stated in saying that the conveyance cannot stand for the purpose even of any bona fide claim against the debtor.² The right to follow the property stops when it has found its way into the hands of a bona fide purchaser for value or has become the subject of a valid lien without notice.³

The possible exception above referred to is where the sale has been made and the proceeds received by a married woman. Can the property of a married woman, being a volunteer or participating in the fraud, be held in such a case? In Massachusetts, New Jersey, and elsewhere, the question has been answered in the affirmative.⁴ The case first cited was a bill in equity by assignees of W, an insolvent debtor, against his wife and a purchaser from her. W had conveyed property in fraud of his creditors, through a third person, to his wife; she had conveyed it to the other defendant, who claimed to be a purchaser for value without notice. The bill sought to recover the property itself, if the purchaser par-

debtor's money. *Bernheim v. Beer*, supra. In some states the money can be followed into homestead property, under exemption laws. *Shinn v. McPherson*, 58 Cal. 596. See also ante, pp. 55 et seq.

If there were no proceeds, that is, if the grantee of the debtor himself convey the property voluntarily, there is no redress against *him*, according to the weight of authority. *Tasker v. Moss*, 82 Ind. 62; *Austin v. Barrows*, 41 Conn. 287; *Adler v. Fenton*, 24 How. 407; *Lamb v. Stone*, 11 Pick. 527. Contra, *Mott v. Danforth*, 6 Watts, 304; *Kelsey v. Murphy*, 26 Penn. St. 78. See vol. 1, p. 69.

¹ *Ferguson v. Hillman*, supra.

² Ante, p. 398. Property conveyed to a garnishee in fraud of the grantor's creditors may be taken. *Cummings v.*

Feary, 44 Mich. 89. Special statutes (see the case just cited) provide for such cases; but the general statutes against fraudulent conveyances would reach them.

³ This does not embrace attaching or judgment creditors. *Devoe v. Brandt*, 53 N. Y. 462; *Schweizer v. Tracy*, 76 Ill. 345, 351. See vol. 1, pp. 406, 407.

⁴ *Clark v. Jones*, 5 Allen, 379; *Post v. Stiger*, 29 N. J. Eq. 558; *Sloan v. Torry*, 78 Mo. 623; *Bernheim v. Beer*, 56 Miss. 149. But this does not apply to money due to the wife, for insurance effected by her upon buildings voluntarily conveyed to her in fraud of her husband's creditors; that would not be proceeds of the property conveyed to the wife. *Bernheim v. Beer*, supra.

Further see *Schenck v. Hart*, 82 N. J. Eq. 774.

ticipated in the fraud; if the purchase was good, then the proceeds of the sale in the hands of the wife. The plaintiff was held entitled to recover against the wife.¹

The Supreme Court of the United States has held the contrary in a case² relating to the law of New York. It was admitted that the property could be followed into the wife's hands so long as it could be identified; but where an action against the wife in personam, i. e. as a debtor, was necessary, the remedy was gone. And the statutes of New York fell far short of making a married woman liable for money or property received at her husband's hands which ought to have gone to paying his debts.³ The answer to this is that the husband practically has his property still, and that it is now exempt from his debts; the rule supplies a dangerous temptation.⁴

¹ 'If,' said the court, 'the premises were conveyed to Mrs. W . . . to defraud creditors, and the conveyance was made in secret trust for his own use and benefit, the proceeds of the land may be followed and reclaimed by his assignees, so far as they can be identified into whatever form the property may be changed. 2 Story on Equity, § 1258; Taylor v. Plumer, 3 Maule & S. 562. And an action at law may therefore, in the case stated, be maintained against her to recover the proceeds in her hands; for her conveyance to J was a conveyance in reference to her separate estate, and she is liable to a suit in relation to all matters concerning it.' That trust funds can be followed at law see United States v. State National Bank, 96 U. S. 30; Taylor v. Plumer, supra; vol. 1, p. 34, note. The point was so decided as long ago as temp. Lord Mansfield, in a suit for money had and received. Moses v. Macferlan, 2 Burr. 1005. Nor was that the first case.

² Phipps v. Sedgwick, 95 U. S. 8.

³ Miller, J. for the court: 'It answers the demands of justice in such cases if the creditor, finding the property itself in her hands, or in the hands of one holding it with notice, appropriates it to pay his debt. But if it is beyond his reach, the wife should no more be made liable for it than if the husband himself had spent it in support of his family or even of his own extravagance.' See also Trust Co. v. Sedgwick, 97 U. S. 304; Huntington v. Saunders, 120 U. S. 78.

In the New Jersey case (Post v. Stiger, supra) the wife was not allowed to say that she had lost all that she had received, by unfortunate bargains. 'A fraudulent grantee,' said the court, 'cannot repel the claims of the creditors of the grantor by simply saying, "I have lost, by imprudent bargains or collusive foreclosures, the property I attempted to conceal, and therefore I am answerable for nothing."'

⁴ Ac. Wait, Fraudulent Conveyances, § 180.

And the right to follow the property extends, generally speaking, to all who derive title from the creditor, including his assigns.¹ So also, for ordinary purposes, proof of the fraudulent intent with which a debtor has made a conveyance of his property puts a purchaser of the same, under levy and sale by the creditor, into the position of the debtor in respect of rights of contract touching the property in question; except in so far as such rights may be personal or not 'run with the land.' If then the property was under mortgage, so that the right seized and sold was the equity of redemption (which the debtor had fraudulently attempted to make away with), the purchaser will acquire the debtor's right to redeem.² But the purchaser in such a case would not, it is held, acquire any right to have the mortgage itself set aside, as having been made in fraud of the mortgagor's creditors; because, as the purchase was subject to the mortgage, that was an election not to avoid the mortgage, and the price paid is to be understood as the value of the estate over and above the sum for which it had been mortgaged.³

The purchaser might acquire, it seems, the position of the debtor touching torts or depredations upon the property before the levy, in so far as it could be shown that the acts done were suffered or done with intent to defraud creditors. If property was in that way withdrawn from the estate, as by cutting and carrying away timber, the same could be taken by the creditor. It seems that the creditor

¹ Warren v. Williams, 52 Maine, 349; Cook v. Ligon, 54 Miss. 655.

² Gerrish v. Mace, 9 Gray, 235; Van Deusen v. Frink, 15 Pick. 449.

³ Russell v. Dudley, 3 Met. 147. See Gerrish v. Mace, supra, at p. 237. But a purchaser at administrator's sale, who is not a creditor, would not acquire a right to impeach a deed of the property by the intestate as in fraud of creditors. Hall v. Callahan, 66 Mo. 316. Comp. vol. 1, pp. 214, 215. To

defeat a suit however by the administrator to enforce a vendor's lien in respect of a former sale of the property by the intestate, the subsequent purchaser at administrator's sale may show that the former sale was made without consideration, so that nothing is due thereon; and for *that* purpose may show that such sale was made with intent to defraud the grantor's creditors. Chapman v. Callahan, 66 Mo. 299.

would not acquire any right of *action* for tort which the debtor may have had;¹ on the other hand the purchaser would acquire all the rights of the *creditor*, as e. g. the right to perfect his title in the courts,² and to defeat all colorable claims to or against it.³

§ 10. RETROACTIVE EFFECT: PROSPECTIVE EFFECT.

Except as reflecting back, by way of evidence, a motive for a prior act, proof of intent to defraud, under the statutes in favor of *creditors*, has in itself no retroactive effect;⁴ in the absence of statute, or of agreement,⁵ it will not, save in certain cases of 'holding out,'⁶ avoid a prior valid act.⁷ Thus the fact that an assignor is shown to have been guilty of fraud in the course of carrying out a valid assignment will not have the effect to invalidate the assignment itself.⁸ Nor can a subsequent conveyance in fraud of creditors validate a

¹ Comp. vol. 1, pp. 214, 215.

² *Gerrish v. Mace*, 9 Gray, 235, 237; *Ryland v. Callison*, 54 Mo. 514; *Gould v. Steinburg*, 84 Ill. 170; *Gallman v. Petrie*, 47 Miss. 131, *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 481; *Hoxie v. Price*, 31 Wis. 82.

³ See e. g. *North Star Boot Co. v. Ladd*, 32 Minn. 381; *Coykendall v. Ladd*, ib. 529.

⁴ As to 27th Eliz. c. 4, in favor of *purchasers*, see chapter 21.

⁵ The common case of provisions in insurance policies, that false swearing by the assured in regard to the loss shall avoid the policy, and some statutes on the subject (e. g. a late one in Massachusetts) may be mentioned among cases of the kind.

⁶ Withholding a deed, such as a mortgage, from record will have the effect against creditors relying upon the record title to invalidate the deed, as against them. *Sanger v. Guenther*, 73 Wis. 354; chapter 13, at end.

⁷ *Goodwin v. Kerr*, 80 Mo. 276; *Todd v. Nelson*, 109 N. Y. 316, 328; *Russell v. Winne*, 37 N. Y. 591; *Decker v. Wilson*, 45 N. J. Eq. 772. See as bearing upon this subject, *Morrill v. Kilner*, 113 Ill. 318; *Danner Land Co. v. Stonewall Ins. Co.* 77 Ala. 184.

⁸ 'The appellant insists that Langster being the brother-in-law of Lee, the permitting him to remain sometime in possession of the residence after the trust sale, etc. was an indication that the transaction [the execution of a deed of trust] was fraudulent. If this were true, being a matter occurring subsequent to the execution of the trust deed, it could not affect its validity.' *Hempstead v. Johnston*, 18 Ark. 123. But if the subsequent acts were sufficiently near to be connected with the one impeached, it would be relevant. Further see chapter 10, near the end.

⁹ *Goodwin v. Kerr*, *supra*.

prior imperfect conveyance not in fraud of creditors.¹ On the other hand a fraudulent intent in a former transaction will not affect the present one, unless the two are really parts of the same transaction or unless they are in some way connected.² Thus the fraudulent disposal or concealment by the debtor, of part of his property, sometime prior to a general assignment in favor of his creditors will not of itself avoid the assignment.³ Nor will large purchases on credit, though made with intent to defraud creditors, avoid a subsequent assignment unless they were made in contemplation of the assignment.⁴

§ 11. INDEMNITY TO OFFICER: OFFICER'S DUTY.

We have seen that a sheriff or other proper officer, to whom process of attachment or of execution has been com-

¹ *Davis v. Lumpkin*, 57 Miss. 506; *Borst v. Corey*, 16 Barb. 136. Thus a conveyance in pursuance of a prior verbal agreement for a settlement in consideration of marriage, invalid for want of a writing, will, it is held, be invalid against creditors. *Borst v. Corey*, supra. But see *Hussey v. Castle*, 41 Cal. 239; ante, pp. 134, 161. Comp. cases of strong moral obligation, ante, pp. 159, 160; and see *Sloan v. Torry*, 78 Mo. 623.

² See *Danner Land Co. v. Stonewall Ins. Co.* 77 Ala. 184; *Loos v. Wilkinson*, 110 N. Y. 195; s. c. 113 N. Y. 485; *Todd v. Nelson*, supra. Hence the fact that a mortgage of all the personalty on a farm is fraudulent will not of itself avoid a mortgage of the farm itself, that being a separate and distinct transaction. *Whitney v. Traynor*, 74 Wis. 289. Further see *Batten v. Richards*, 70 Wis. 272; *Green v. Van Vechten*, 63 Wis. 16.

³ *Wilson v. Berg*, 88 Penn. St. 167. Of course such disposal or concealment

might have the effect to defeat the assignment if near enough to it to show that that was only part of one and the same scheme of fraud, or to show that the assignment was then in contemplation and intention. See upon that subject *Foley v. Bitter*, 34 Md. 653; *Main v. Lynch*, 54 Md. 658; *Morrill v. Kilner*, 113 Ill. 318.

⁴ *Green v. Van Vechten*, 63 Wis. 16. Withholding from the assignee may and ordinarily will have a different effect. *Farrington v. Sexton*, 43 Mich. 454; *Hubbard v. McNaughton*, ib. 220. See *Shultz v. Hoagland*, 85 N. Y. 464. That would be much the same thing as a trust or reservation in favor of the debtor out of property professedly turned over by him, and hence would show an intent to defraud in the execution of the assignment.

A mortgage, valid when executed, is not invalidated by a general assignment made by the mortgagor on the following day. *Root v. Harl*, 62 Mich. 420; *Root v. Potter*, 59 Mich. 498, 506.

mitted, may levy directly upon property conveyed by the defendant in fraud of his creditors. But further it is his duty so to do, unless there is reasonable ground for doubt whether the conveyance was fraudulent; in which case he may probably require an indemnity from the plaintiff before taking the property. There has been some doubt however of the officer's duty — there is no doubt of his right — to levy upon property which has already been taken in execution, but really for the debtor and therefore in fraud. Can the officer demand indemnity in such a case?

The difficulty has related to cases in which the *judgment* as well as the execution has been fraudulently obtained; there has been no doubt of the sheriff's right and duty ordinarily to take property which has previously been taken by a fraudulent execution, as where goods have been seized on execution and then left for considerable time without excuse in the hands of the debtor.¹ And it has come to be settled in England, after some doubts, that the same is true where the judgment assailed was fraudulent against creditors, if at all events the officer had notice of the character of the judgment. The question was finally set at rest by a decision upon the admis-

¹ *Davis v. Drew*, 53 Cal. 152; *Humphreys v. Harkey*, 56 Cal. 283; *May, Fraudulent Conveyances*, 171, 2d ed. In *West v. Skip*, 1 Ves. 239, 245, Lord Hardwicke said: 'If a creditor by fieri facias seize the goods of the debtor and suffer them to remain long in the debtor's hands, and another creditor obtains a subsequent judgment and execution, it has been determined often that it is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable.' Followed in *Lovick v. Crowder*, 8 Barn. & C. 132, 136. Where retaining possession is only prima facie evidence of fraud as is the more general rule (see ante, p. 356), there may of course be a

question of fact for the jury in a case like *West v. Skip*. See *Bradley v. Windham*, 1 Will. 44. But see ante, p. 349.

Lord Tenterden in *Lovick v. Crowder*, supra, at p. 135: 'If a party be in possession of goods, apparently the property of a debtor, the sheriff, who has a fieri facias to execute, is bound to inquire whether the party in possession is *bona fide*, and if he find the possession is held under a fraudulent bill of sale he is bound to treat it as null and void and levy under the writ.'

So where the sheriff was directed on the first execution not to sell. *Ib.* See further *Christopherson v. Burton*, 3 Ex. 160.

sibility of evidence offered to show that a judgment and execution, pleaded by a sheriff to a suit for neglecting to levy upon the property taken under that judgment, was in fraud of creditors ; the evidence being held admissible.¹

The decision just referred to has however been doubted, in so far as it upholds the position that the officer is bound to know the character of the judgment in question ;² and justly, for it is often extremely difficult even for the court, in possession of all the facts, to determine whether a judgment is fraudulent. The officer, in a case of reasonable doubt, ought to be able to require indemnity, and to refuse to proceed to take the property unless that is given. It is apprehended that this is the rule in the United States generally ; if not so at common law, then by statute.³

On the other hand if the officer proceeds of his own motion, and not at the instance of the plaintiff, to take particular property, it is his affair entirely ; he now acts at his peril, and cannot look to the plaintiff in the writ for protection. But if he can show that the property in question has been conveyed with intent to defraud the debtor's creditors, he will

¹ *Imray v. Magnay*, 11 Mees. & W. 267 ; *Remmett v. Lawrence*, 15 Q. B. 1004, 1007 ; *Christopherson v. Burton*, 8 Ex. 160. Among the former cases may be mentioned the following : *Warmoll v. Young*, 5 Barn. & C. 660 (evidence of fraud received) ; *Tyler v. Leeds*, 2 Stark. 218 (same) ; *Shattock v. Carden*, 6 Ex. 725 (same, it seems) ; *Barber v. Mitchell*, 2 Dowl. P. C. 574 (contra) ; *Kempland v. Macaulay*, 4 T. R. 436 ; *Gale v. Williamson*, 8 Mees. & W. 405 ; *Drewe v. Lainson*, 11 Ad. & E. 529 ; *May*, *Fraudulent Conveyances*, 174 et seq. 2d ed.

² *Remmett v. Lawrence*, 15 Q. B. 1004. Doubts were thrown out upon this point by both Lord Campbell and Sir Wm. Erle ; the latter saying that the present case showed that the doc-

trine in question would be a great hardship upon the sheriff. 'He finds a very intricate state of circumstances ; he is threatened if he does not pay over the proceeds ; he offers to do so on being indemnified, but he is required to go on at his peril, under liability to an action, from which he is relieved only by the accident of having seized goods not belonging to the execution debtor.'

³ It is provided by statute in Massachusetts as to goods that 'if there is reasonable doubt as to the ownership of the goods, or as to their liability to be taken on the execution, the officer may require sufficient security to indemnify him for taking them.' Pub. Sts. c. 171, § 35. It is believed that similar statutes, and sometimes embracing lands, exist in most of the states.

of course (so far) be protected. If however he only succeeds in showing that the debtor has made a conveyance in fraud of creditors, the case will be otherwise; he must show that the property *taken* was (when taken) the debtor's. It will not be enough, in ordinary cases, for him to show that he has taken the proceeds of the sale or other disposition of the property fraudulently conveyed; such proceeds would not ordinarily be treated, apart from special statute, as the property of the debtor, though they could be reached in equity, by way of trust.¹

But it appears to be necessary for the officer to justify his process itself, when suit is brought by a stranger-claimant of the property; the general rule that an officer justifies by his process not applying to such a case. If he justifies under a writ of attachment against the vendor, it is held that he must show a debt (or demand) against him; if under an execution, then a judgment; the reason given being that it is only by showing that he acted for a creditor (or 'other') that he can question the title of the buyer-claimant.² And this seems to mean that if the officer justify under an attachment writ, he must show a valid debt or demand;³ a judgment of course would fulfil that requirement.

¹ *Lawrence v. Bank of Republic*, 35 N. Y. 320; *Adams v. Davidson*, 10 N. Y. 309, 315. See *Thurber v. Blanck*, 50 N. Y. 83.

² *Damon v. Bryant*, 2 Pick. 411; *Keys v. Grannis*, 3 Nev. 550; *Thornburgh v. Hand*, 7 Cal. 561. Parker, C. J. in *Damon v. Bryant*: 'The distinction . . . is that, where the execution or writ upon which the goods are taken is against the plaintiff himself, the officer is justified by the precept

itself, for that commands him to take the goods of the plaintiff. . . . But where the goods are claimed by a person who was not a party to the suit, and he brings trespass, and his title is contested on the ground of fraud, under the stat. 13 Eliz. c. 5, a judgment must be shown, if the officer justifies under an execution, or a debt if under a writ of attachment, because it is only by showing that he acted for a creditor that he can question the title of the vendee.

³ See *Damon v. Bryant*, *supra*, in which a new trial was granted because the court below refused to instruct the

jury that the defendant should show a valid cause of action against the vendor.

§ 12. SPECIAL STATUTES DISTINGUISHED.

A distinction incidentally noticed on another page,¹ between the effect of the general statutes against fraudulent conveyances and certain special statutes, such as the New York statute of Uses and Trusts, which has been widely adopted, should be more fully stated here. We have seen that there is some diversity among our courts in regard to the question whether the statute of Elizabeth, and its counterparts, embrace future on a like footing with existing creditors;² but the New York statute last mentioned leaves little if any doubt what that Act means. It applies only to existing creditors,—in a contest, that is to say, between existing and subsequent creditors. Where title is taken in the name of a third person, by the purchaser of property, even with personal intent to defeat the purchaser's creditors, his existing creditors will have priority over subsequent creditors.³ This however does not necessarily or probably imply that subsequent creditors are cut off entirely from proceeding against the trust conveyance. They are only postponed to existing creditors; the conveyance is not, it seems, good against them.⁴ The general statute against fraudulent conveyances would prevent that, in the absence of clear language to the contrary; assuming that by the law of the state the general statute is construed to apply in favor of subsequent creditors.

The authorities to this point are *Lake v. Billers*, 1 *Ld. Raym.* 733; *Bull. N. P.* 234; *Ackworth v. Kempe*, 1 *Doug.* 41; *Savage v. Smith*, 2 *W. Black.* 1104; *Bac. Abr. Trespass, G. 1.* The editor of 2 *Pickering* adds, 'See also *Harget v. Blackshear*, 1 *Taylor*, 107; *High v. Wilson*, 2 *Johns.* 46; *Jenner v. Joliffe*, 6 *Johns.* 9; *Barker v. Miller*, *ib.* 195; *Blackley v. Sheldon*, 7 *Johns.* 32; *Holmes v. Nuncaster*, 12 *Johns.* 395; *Doe v. Smith*, 2 *Stark.* 199; *Weyand v. Tipton*, 5 *Serg. & R.* 332; *Casanova v. Aregno*, 3 *La.* 211.'

¹ Ante, p. 89, note.

² Ante, pp. 98 et seq.

³ *Wood v. Robinson*, 22 *N. Y.* 564.

⁴ This is implied in the statement of the court that the statutory trust in favor of the existing creditors prevails over the *equal* equity and the superior diligence of the subsequent creditor.

§ 13. WHO HAVE THE BENEFIT OF THE STATUTES.

Finally whose creditors have the benefit of the statutes against fraudulent conveyances? The grantor's clearly, and only the grantor's.¹ But, as we have seen,² the grantee may himself be considered a grantor in respect of the interest reserved or conferred upon the grantor. Now if in such a case there appears to be no intent on the part of the grantor in the conveyance, there may clearly be a case for the creditors of the grantee therein, because of the trust. But suppose there does appear an intent to defraud, on the part of the grantor in the conveyance, and that the trust is allowed by the grantee with notice that other creditors exist and may be prejudiced,³ can the creditors of the grantee take the property absolutely on the ground of fraud upon them, or, if not, can they take it subject to the trust?

The answer becomes plain, in principle, by taking the original situation as the proper starting-point. The property was then the property of the grantor; that is, his creditors could take it; and those creditors can follow it until its identity is lost or until it passes into the hands of a bona fide purchaser for value or becomes without notice the subject of a valid lien;⁴ they must therefore prevail over the creditors of the grantee, notwithstanding any fraud upon them by the grantee with the grantor's privity, for the grantee's creditors as such are not purchasers for value.⁵ It follows that the grantee

¹ 'Grantor' and 'grantee' are here used for convenience to indicate any seller or buyer, donor or donee.

² Ante, pp. 212, 213.

³ This notice is necessary, where the grantee is a purchaser for value. *McDowell v. Stelle*, 87 Ala. 493; *Miller v. Lehman*, ib. 517.

⁴ *Clark v. Rucker*, 8 B. Mon. 583; *Davis v. Graves*, 29 Barb. 480. Neither judgment creditors nor attaching creditors would fall within this designation;

they do not stand on the footing of purchasers for value. *Devos v. Brandt*, 53 N. Y. 462; *Ex parte Howe*, 1 Paige, 125; *Gibson v. Warden*, 14 Wall. 249; *Schweizer v. Tracy*, 76 Ill. 345, 351; *Nathan v. Giles*, 5 Taunt. 558. See vol. 1, pp. 406, 407.

⁵ *Mullanphy Bank v. Lyle*, 7 Lea, 431; *Clark v. Rucker*, 8 B. Mon. 583, 584; *Cramer v. Blood*, 48 N. Y. 684, affirming 57 Barb. 155; *Murphy v. Briggs*, 89 N. Y. 446. After the

can reconvey to the grantor, unless the land has become subject to bona fide liens in the hands of the grantee.¹ If however the grantee's general creditors have been cut off from property turned over to the grantor as consideration, which they can similarly follow, they will in like manner be entitled to take it. It may well be too that creditors of the grantee could take the property conveyed to him in case the grantor's creditors should not move in the matter, after notice of the fraudulent conveyance, for the conveyance is good between the parties;² but it would seem that, in a court of equity, if the facts were brought out in such a case, the creditors of the grantor would have to be made parties, or notified of what was going on, before the grantee's creditors could be allowed to appropriate the property.

It is not one of the consequences of the fraud of a debtor upon his creditors that third persons can avail themselves of the fact.³

grantor's creditors are satisfied the creditors of the grantee can claim. *Mullanphy Bank v. Lyle*, supra.

¹ *Carll v. Emery*, 148 Mass. 32; *Clark v. Rucker*, supra; *Davis v. Graves*, supra; *Cramer v. Blood*, 48 N. Y. 684, affirming 57 Barb. 155. Contra, *Keel v. Larkin*, 83 Ala. 142; s. c. nom. *Larkin v. Mead*, 77 Ala. 485. It was supposed in *Keel v. Larkin* that the cases just cited might be distinguished from that case on the ground that they were not cases, as that one was, of 'actual intentional fraud.' Sed quære. In *Keel v. Larkin* however there was no question of conflicting creditors; the creditors being at once creditors of both parties to the deed. And in *Maher v. Swift*, 14 Nev. 324, in which the grantee was not allowed to reconvey, the grantee's creditors had levied upon the property, and no claim appears to have been made by the grantor's creditors.

Further as bearing upon this subject see *Moore v. Livingston*, 14 How. Pr. 1; *Taylor v. Wendling*, 66 Iowa, 562; *Caffal v. Hale*, 49 Iowa, 53; *Parker v. Tiffany*, 52 Ill. 286; *Mathews v. Buck*, 43 Maine, 265; *Ferguson v. Bobo*, 54 Miss. 121. As to liens see note 4, p. 430.

Carll v. Emery, supra, goes much further than the other decisions; the court holding that the fraudulent grantor, after disaffirming the fraud participated in by the grantee and demand of return of the property, as it was held he might do, could then sue and recover the same for the use of his creditors. No other authority has gone this length. The court assumed this to be a result of holding that fraud may be purged. See chapter 6, § 13, at end.

² *Keel v. Larkin*, 83 Ala. 142; *Maher v. Swift*, 14 Nev. 324.

³ *Bond v. Endicott*, 149 Mass. 282; chapter 6, § 14.

CHAPTER XVII.

MINOR BADGES OF FRAUD.

THE term 'badge of fraud' is a term of convenience, and not a term of art; that is to say, it has no exact meaning. It is used of facts which make a presumptive, or even an absolute,¹ case of fraud; such cases have, under the designations to which they severally belong, been considered in the preceding pages. But the term is also used of facts which are not sufficient to raise a presumption; still if the question is of the effect of the particular fact or set of facts as evidence, as distinguished from their relevancy and admissibility, the subject is one for consideration in the substantive part of the law as truly as if an absolute presumption of fraud followed.²

The judge has the right and it is his duty to direct attention to particular facts or to a set of facts, as of special sig-

¹ *Allen v. Bonnett*, L. R. 5 Ch. 577, Lord Hatherley. This use however is not very common. See note 2, *infra*.

² In a recent case, presenting the common view of the subject, it is said: 'A badge of fraud has been defined to be a fact which is calculated to throw suspicion upon a transaction, and calling for an explanation. *Peebles v. Horton*, 64 N. Car. 374. In *Terrell v. Green*, 11 Ala. 213, it was said to be an inference drawn by experience from the customary conduct of mankind. These badges of fraud do not in themselves constitute fraud, but are rather signs or indicia from which its existence may be properly inferred as matter of evidence. They are more or less strong or weak

according to their nature and number concurring in the same case. They are as infinite in number and form as are the resources and versatility of human artifice. The present case presents numerous illustrations . . . enumerated in the various rulings of the court, with *explanations* as to their *legal* force and effect,' etc. *Somerville, J.* in *Finn v. Edwards*, 75 Ala. 411. But it is added that the weight to be given to 'badges of fraud is a matter usually for the determination of the jury.' The minor badges differ from ordinary evidence mainly in the part the judge is entitled to take in giving authoritative explanation of them.

nificance (or indeed as, under the circumstances, of slight significance), though he may not be able to go further and declare that of their own necessary force they establish fraud. He finds his duty laid down by the law itself in most cases; that is to say, he finds that the courts have established it that particular attention should be directed to certain special acts or omissions. Here is then the operation of law upon the judge; and then there is something of the nature of law in the particular fact or facts, in that the law itself attributes to them ordinarily some special significance which but for the law they might not have,—though under all the circumstances this significance may be entirely annulled. There is then a law of the minor badges of fraud as well as of the greater badges, a law which operates, it may be remarked, in a way not wholly unlike the law in relation to crimes.¹ The question then to be considered is, of the occasions when this duty rests upon the judge; or rather, what facts are sufficient to create one of these minor badges of fraud. This question can only be answered by instances; there is no rule of law by which to determine when a fact shall be considered to fall within the vague bounds of minor badges of fraud.

The existence of badges of fraud of this minor kind was recognized long ago, in the most famous case² on the statute of 13th Elizabeth; and the chief examples were then pointed out. Among the 'points resolved,' that is, determined as matters to be laid down to the jury as binding upon their attention, were these (omitting such as clearly make a presumption): The gift had the signs and marks of fraud, because the gift is general, without exception of apparel or

¹ Of course this analogy is not to be pressed very far. In criminal prosecutions the judge must instruct the jury in the law; but the jury may disregard the instructions. In the matter of the minor badges of fraud the judge must instruct the jury, and the jury now are

in duty bound to heed the instructions; but the net result may be that the badges are thrown out altogether, and that too consistently with the instructions.

² Twyne's Case, 3 Coke, 80.

anything of necessity; for it is commonly said, 'quod dolus versatur in generalibus.'¹ It was made in secret;² and 'dona clandestina semper suspiciosa.'³ It was made pending the writ.⁴ The deed recites that the gift was made honestly, truly, and bona fide; and 'clausulæ inconsuetæ semper inducunt suspicionem.'

It is plain that none of these facts, or 'points' as they are fittingly called, would be sufficient alone to make a case of intent to defraud; but they are 'points' to be laid down to the jury, and the jury must take them as somewhat special evidence. They have their effect because the law declares it; just how much effect, the law does not and could not well declare: they may have greater or they may even have less force than direct evidence of fraud.⁵ The term indeed is very

¹ See *Earnshaw v. Stewart*, 64 Md. 518.

² Secrecy is not fraud per se, except in confidential relations and the like, but it is a badge of fraud. *Robinson v. Woodmansee*, 80 Ga. 249; *Hopper v. Gladden*, 75 Ga. 532. E. g. concealment of a purchase, or withholding a deed from record. *Robinson v. Woodmansee*. See *Brown v. Mitchell*, 102 N. Car. 347, 372; *infra*, p. 437.

³ An embarrassed debtor conveys valuable property to a near relation, in secret, none but relatives being present. This is presumptively a fraud. *Reiger v. Davis*, 67 N. Car. 185; *Peebles v. Horton*, 64 N. Car. 374. See *Seals v. Robinson*, 75 Ala. 363. In the second case the grantor conveyed all his property, in secret, to pay old debts. This was held a 'badge of fraud.'

⁴ See *Clapp v. Leatherbee*, 18 Pick. 131; *Towne v. Fiske*, 127 Mass. 125; *Dent v. Ferguson*, 132 U. S. 50; *Moore v. Roe*, 35 N. J. Eq. 90 and 526; *Colquitt v. Thomas*, 8 Ga. 258; *Eads v. Thompson*, 109 Ill. 87; *Leach v. Fowler*, 22 Ark. 143; *Atkins v. Atkins*, 18 Neb.

474; *Booher v. Worrill*, 57 Ga. 235; *Gamble v. Harris*, 5 Del. Ch. 512; *ante*, pp. 12, note 2, 81, note 2. A conveyance made for value in good faith pending suit or after judgment will be upheld. *Low v. Wortman*, 44 N. J. Eq. 193. And so of a conveyance to a creditor by way of preference.

⁵ That there is some legal difference between evidence of fraud in the ordinary sense and these minor badges of fraud (those which do not make a presumption) is indicated by the court in *Knight v. Capito*, 23 W. Va. 639. 'Among the badges of fraud,' says the court, 'is a false statement of the consideration for which the conveyance was made. In the case of a mortgage a discrepancy between the amount to be secured and the mortgage debt is a badge of fraud; and if the statement of the debt due is intentionally false, it is held to be a direct evidence of fraud. *Marrriott v. Givens*, 8 Ala. 694.' Here the 'badge' is treated as of less value than direct evidence of fraud. Where the badge is a 'strong badge,' the case may be the reverse. In *Woodworth v. By-*

loosely and generally used in the books, often with little significance, oftener without precise meaning; and it is often difficult to determine whether a particular fact or set of facts is to be treated as a badge of fraud in a technical sense or only as relevant on the question of fraud.¹

Among the modern examples furnished by the books may be mentioned the following: Conveyances for inadequate, even though not grossly inadequate,² consideration, which have the effect to delay creditors, unless, or sometimes especially if, they are between near relatives.³ The fact that a

erly, 43 Iowa, 106, the court says: 'No one can read the testimony and say there was no evidence tending to show the sale to be fraudulent. On the contrary there were several circumstances in the testimony which the law styles badges of fraud.' Here the 'badges' are something more than ordinary evidence, and yet are not called presumptions.

These minor badges have even been spoken of as 'common presumptions' as distinguished from legal presumptions. Thus by Gibson, C. J. in *Avery v. Street*, 6 Watts, 247, 249: 'Appertaining to conveyances of chattels, the features of fraud were depicted in *Twyne's Case*, . . . but without distinguishing betwixt such as create legal presumptions . . . and such as are to be left, for what they are worth, to a jury. Thus the generality of the gift in that case; the antedating of the deed, with direction to the attorney to take special pains to prevent it from being frustrated; the sealing of it in the absence of the donee; the recital that it was made honestly; the agreement to keep it secret; the custody of it by the donor's brother; the assessment of the goods by the donor as his own; and the extent levied of them, as the donor's property, by the donee; were, separately, circumstances of strong

suspicion, and aggregately of convincing proof, that the transaction was colorable, but still no more than evidence of actual fraud, and not distinctive tests entitled to an artificial force to be graduated by the court; at least I have seen no case in which they have been so applied. But other badges were indicated, which have since been circumstances of legal, instead of common, presumption. Pendency of an action at the time of the conveyance, or retention of possession of it, has always created an inference of fraud to induce the necessity of explanation.' See also as to the effect of a combination of badges of fraud, *Diggs v. McCullough*, 69 Md. 592; *Newman v. Kirk*, 45 N. J. Eq. 677; *Brown v. Mitchell*, 102 N. Car. 347, 370; *Jackson v. Harby*, 70 Texas, 410; *Hickman v. Trout*, 83 Va. 478.

¹ See e. g. *Spaulding v. Adams*, 63 Iowa, 437, unusual extension of credit.

² *Parker v. Barker*, 2 Met. 423; *Brown v. Mitchell*, 102 N. Car. 347, 369.

³ *Fisher v. Shelver*, 53 Wis. 498; *King v. Hubbel*, 42 Mich. 597. See *In re Johnson*, 20 Ch. D. 389. Fry, J.: 'It appears plain that though valuable and good consideration was given by the daughters [to their mother], that consideration cannot have been the full

trading debtor sells out his whole stock of goods to a near relative, in consideration of negotiable notes only, is held to be 'a strong badge of fraud.'¹ A *slight* badge of the kind would be a materially false statement of the consideration for the conveyance;² the same is said to be true of a discrepancy, in a mortgage, between the amount to be secured and the mortgage debt;³ so perhaps of any other false recital of a

value of the estate. But it also appears to me to be plain that where a bona fide and honest instrument is executed, for which valuable consideration is given, and the instrument is one between relatives, the court cannot say that the difference between the real value of the estate and the consideration given is a badge of fraud.' In *Copis v. Middleton*, 2 Madd. 410, a conveyance by uncle to nephew, Sir Thomas Plumer, V. C. said: 'The court has not been very particular as to the sufficiency of the consideration, if the contract was bona fide. *Nunn v. Lashbrooke*, 8 T. R. 521.' See also *Bullard v. Briggs*, 7 Pick 533; *Holden v. Burnham*, 63 N. Y. 474; *Marshall v. Croom*, 52 Ala. 554; *Hartman v. Allen*, 9 Lea, 657; *Bumpas v. Ditson*, 7 Humph. 317; *Hempstead v. Johnston*, 18 Ark. 123; *Splawn v. Martin*, 17 Ark. 146; *Earls v. Thompson*, 109 Ill. 87; ante, p. 190, note. Relationship alone, though near, is nothing, by the better view.

Conveyances made to near relatives, in rapid succession, by a debtor would be very suspicious. *Martin v. Kennedy*, 83 Ky. 335.

Further as to inadequacy, *Sawyer v. Bradshaw*, 125 Ill. 440; chap. 19, § 2.

¹ Shaw, C. J. in *Perkins v. Webster*, 2 Cush. 480; *Peebles v. Horton*, 64 N. Car. 374, *supra*, p. 434, note. See also for the same expression, *Jackson v. Harby*, 65 Texas, 710. Further see

Massie v. Enyart, 32 Ark. 251; *Ringgold v. Waggoner*, 14 Ark. 69; *Benson v. Benson*, 70 Md. 253; *Lewis v. Linscott*, 37 Kan. 379; *Gregg v. Lee*, 37 La. An. 164; of sales on credit to persons known to be irresponsible. It is laid down however that long credit, failure to take security, great value and present inability of the buyer to pay, are not so necessary badges of fraud in a sale as to require the court to declare them such, without request, in charging the jury. *Davidson v. Crittenden*, 55 Ga. 497. And indeed gross inadequacy is treated as only a badge of fraud. *Almond v. Gairdner*, 76 Ga. 699; *Bickler v. Kendall*, 66 Iowa, 703. See chapter 19, § 2.

² See *Pickett v. Pipkin*, 64 Ala. 520. In this case it is said: 'An instrument misrepresenting the transaction to which it relates is at all times the object of doubt and suspicion, which diminishes or increases as there is evidence negating an intent or any motive to deceive, or evidence that there was deliberate intentional deceit.' See further *Lawson v. Alabama Warehouse Co.* 80 Ala. 341; *Hubbard v. Allen*, 69 Ala. 283; *Fuller v. Brewster*, 53 Md. 358.

³ *Knight v. Capito*, 23 W. Va. 639, *supra*, p. 434, note; *Rice v. Morner*, 64 Wis. 599; *Mason v. Franklin*, 58 Iowa, 506. See *Berry v. O'Connor*, 33 Minn. 29; *Moore v. Roe*, 35 N. J. Eq. 90 and 526.

'And where,' it is said in *Knight v.*

misleading nature;¹ so of purposely withholding a deed from record;² and so of concealment of material facts.³

Again when it is said that 'stricter proof' of good faith or the like is required in a particular case than in ordinary cases,⁴ the meaning appears to be that a badge of fraud beyond ordinary evidence has been shown; as e. g. where a son has made a voluntary conveyance to his father or mother.⁵

In regard to the maxim quoted by Coke, as above men-

Capito, 'the conveyance is alleged to have been made in payment of old debts . . . the absence of any notes or accounts between the parties evidencing the existence of the debts; and the failure of the grantee to produce an important witness within his power . . . ; are all circumstances exciting suspicions of unfairness.' *Peebles v. Horton*, 64 N. Car. 374; *Hamilton v. Blackwell*, 60 Ala. 545. But that is, it seems, only a matter of the relevancy of evidence; it is not called a 'badge.'

¹ The case may be one of absolute fraud. *Proskamer v. People's Bank*, 77 Ala. 257. In that case Clopton, J. said: 'A consideration wholly simulated, or simulated in part, if inserted for the purpose of increasing the apparent consideration to an amount equal or approximating to the value of the property, where the deed is executed with the intent to prevent the property from being subject to the debts of the grantor, . . . is fatal to the validity of the deed.' (The grantee is evidently assumed not to have been privy to the fraud, otherwise the words 'where the deed . . . the grantor' would be without meaning.)

In *Minor v. Sheehan*, 30 Minn. 420, Berry, J. said: 'It is of course always better, in the condition of a mortgage, to describe the liability secured according to the fact; for when this is not

done, it may become necessary to explain away a suspicion.' The false recital in that case was disregarded, the facts repelling any inference of bad faith. See further *McKinster v. Babcock*, 26 N. Y. 37; *Goodheart v. Johnson*, 88 Ill. 58; *Speer v. Skinner*, 35 Ill. 282.

² *Danner Land Co. v. Stonewall Ins. Co.* 77 Ala. 184; *First National Bank v. Jaffray*, 41 Kans. 694; *Klein v. Richardson*, 64 Miss. 41; *Brown v. Mitchell*, 102 N. Car. 347, 369. See chapter 9, § 1.

As to withholding from an assignee in an assignment for the benefit of creditors property that should go to him, see *Farrington v. Sexton*, 43 Mich. 454; *Hubbard v. McNaughton*, ib. 220; *Parcell v. Patterson*, 47 Mich. 505; *Shultz v. Hoagland*, 85 N. Y. 464.

³ 'The fact that the plaintiff had given credit previous to the deed, and was not informed, when subsequent credit was given, of the conveyance to the wife, is no evidence of fraudulent intent.' *Truesdell v. Sarles*, 104 N. Y. 164, 168; *Carr v. Breese*, 81 N. Y. 584. Such a case is one of relevancy.

⁴ *Lloyd v. Williams*, 21 Penn. St. 327; *Knight v. Capito*, 23 W. Va. 639. See *Peebles v. Horton*, 64 N. Car. 374; *Hawkins v. Alston*, 4 Ired. Eq. 137.

⁵ Same cases.

tioned, 'dolus versatur in generalibus,' which means that it is a matter to be shown to the jury that the debtor has stripped himself of all his property of every kind,¹ it is laid down by recent authority that an insolvent debtor, acting in good faith may sell his entire stock of goods in trade to his creditor, in absolute payment of the debt, if there is no material difference between the value of the property and the amount of the debt.² That means of course that such a transaction has no mark of fraud; but the implication is that the contrary would be true if there was any considerable over-payment. Indeed the sale by an insolvent debtor of all his property to one person appears to be thought, by some courts, a badge of fraud.³ However it has been declared that the fact that the plaintiff in an execution upon various pieces of property bought all the property levied upon, and that the prices paid

¹ This, with other facts, may make a case of fraud. *Atkins v. Atkins*, 18 Neb. 474; *Kuhn v. Gustafson*, 73 Iowa, 633; *Low v. Wortman*, 44 N. J. Eq. 193, 201; *Gamble v. Harria*, 5 Del. Ch. 512; *Hoffer v. Gladden*, 75 Ga. 532. In *Gordon v. McIlwain*, 82 Ala. 247, 252, the court, quoting *Seals v. Robinson*, 75 Ala. 363, says: 'The fact that a debtor strips himself of all visible tangible property which is subject to execution at law, retaining only choses in action of uncertain doubtful value, may not be conclusive proof of fraud. . . . But it will awaken suspicion and add strength to other circumstances.' This was said of voluntary transactions, as to future creditors; the law of Alabama requiring proof of 'fraud in fact' in such cases. *Gordon v. McIlwain*, *supra*. See also, for like sales, *Hornthall v. Schonfeld*, 79 Ala. 107; *Levy v. Williams*, *ib.* 171; *Tryon v. Flournoy*, 80 Ala. 321.

But no benefit must go back to the debtor in the way of hindering his credi-

tors, with notice on the part of the purchaser. See the same cases; especially *Levy v. Williams*; *Carter v. Coleman*, 82 Ala. 177, 182; *Owens v. Hobbie*, *ib.* 466. 'There is a marked distinction,' says *Clopton, J.* in *Levy v. Williams*, 'between a sale for the sole purpose of preferring a creditor and a sale the effect of which is partly a preference and partly a benefit to the debtor;' as where money or property is paid to the debtor for the difference between the amount of the debt and the value of what is taken in payment, when the debtor intends to use the same in fraud of his other creditors, the buyer having notice. *Levy v. Williams*, *supra*; *Moog v. Farley*, 79 Ala. 246.

² *Knowles v. Street*, 87 Ala. 357; *Morrison v. Morris*, 85 Ala. 196; *Jefferson Bank v. Eborn*, 84 Ala. 529; *Walton v. Atkins*, *ib.* 592; *Dixon v. Higgins*, 82 Ala. 284; *Carter v. Coleman*, *ib.* 177; *Pritchett v. Pollock*, *ib.* 169; *Rankin v. Vanbiver*, 78 Ala. 562.

³ *Scott v. Winship*, 20 Ga. 429.

were low, could not be looked upon as a badge of fraud, though it was a circumstance for the jury.¹

Again in regard to the matter of unusual statements, mentioned by Coke, it was said in a well-known Massachusetts case² that the conveyance was somewhat unusual in its terms; it contained stipulations which would make it convenient for the vendor to exercise ownership over the property, and thus presented 'strong badges of fraud.'³ In a New York case⁴ debtors making an assignment for their creditors, selected the son-in-law of one of their number, who lived with one of the debtors, and preferred him as a creditor to a considerable amount; they at first omitted large items from the schedules, and one of these was retained by the debtors for their own use. 'These circumstances of suspicion pressed upon the assignors for an explanation.'

On the other hand great haste and the omission of the common preliminaries of negotiation and the common provisions, in any considerable transaction, are equally causes for suspecting the transaction; and especially is this true where a purchase of a stock in trade is thus made, and made at a gross sum, and with it unpaid accounts the extent or nature of which is unknown to the buyer.⁵ Indeed transfers not in the usual course of trade are, under insolvency statutes, presumptively fraudulent,⁶ and under the statute of Elizabeth they might be badges of fraud.⁷

But all these minor badges of fraud, that is, all badges insufficient to create a presumption, are upon a sliding scale of values, for better or worse according to their own nature and

¹ Allentown Bank v. Beck, 49 Penn. St. 394, 409.

² Jones v. Huggeford, 3 Met. 515.

³ Perhaps such badges would raise a presumption; indeed they might raise a conclusive presumption. See Bryant v. Young, 21 Ala. 264.

⁴ Shultz v. Hoagland, 85 N. Y. 464.

⁵ Leinkauff v. Frenkle, 80 Ala. 136.

⁶ Godfrey v. Miller, 80 Cal. 420; Stevens v. Pierce, 147 Mass. 510; Bufum v. Jones, 144 Mass. 29; Alden v. Marsh, 97 Mass. 160.

⁷ Hoffer v. Gladden, 75 Ga. 532. See Root v. Potter, 59 Mich. 498, 508.

according to the influence of accompanying facts. Indeed no line can be drawn between them and ordinary evidence ; into that they imperceptibly shade ; and there is no rule of law by which they can be said to emerge from the same. Any case may give rise to new ones.

CHAPTER XVIII.¹

THE SAVING: VALUABLE CONSIDERATION.

§ 1. THE STATUTES: DEFINITION.

THE statute of 13th Elizabeth closes with a proviso or saving to the effect that the Act shall not extend to any estate or interest in lands or chattels had, made, conveyed, or assured, which estate or interest is upon good consideration and bona fide conveyed or assured to any persons or body politic or corporate, not having at the time of the conveyance or assurance to them any manner of notice or knowledge of the covin, fraud, or collusion.² So far as concerns its effect as a declaration of substantive law, the statute is only a special enactment of the broad rule that purchase of the legal title³ for value in good faith cuts off equities;⁴ a rule which would

¹ See chapter 6.

² *Zoeller v. Riley*, 100 N. Y. 102.

³ Purchase of an equitable title is generally held not to be within the protection; 'qui prior in tempore, prior in jure' applying to such a case. *Parker v. Clark*, 30 Beav. 54; *Wailes v. Cooper*, 24 Miss. 208. But much may be said on the other side. 1 *Harvard Law Rev.* 1, by Professor Ames. And indeed there appears to be judicial authority against the rule. *French v. Hope*, Pump Court, vol. 4, p. 158, *Kekewich, J.* apparently denying *Parker v. Clark*, *supra*.

⁴ As to the burden and order of proof see vol. 1, pp. 130 et seq.; *Zimmer v. Miller*, 64 Md. 296; *Houston v. Blackman*, 66 Ala. 559; *Whelan v. McCreary*, 64 Ala. 319; *Roswald v. Hobbie*, 85 Ala.

73; *Letson v. Reed*, 45 Mich. 27 (which is not entirely in accord with *Starin v. Kelly*, 88 N. Y. 418, vol. 1, p. 134). See also *Callan v. Statham*, 28 How. 477; *Lipscomb v. McClellan*, 72 Ala. 151; *Buchanan v. Buchanan*, ib. 55; *Neal v. Gregory*, 19 Fla. 356; *Cothran v. Forsyth*, 68 Ga. 560; *Booher v. Worrill*, 57 Ga. 235. In some cases it is said that proof of fraud on the part of the vendor is not enough. *Burdsall v. Waggoner*, 4 Colo. 256. But it is clear that such proof makes a *prima facie* case against the buyer. See vol. 1, *ut supra*.

The statute of 27 Eliz. c. 4, contains a similar saving in regard to purchasers of lands; and much that is said in regard to the exception in the present

... which to the contrary, without

... Statutes, 34 Conn. 316 ;
... and 37 Conn. 424.

... which held that
... absolutely void,
... could be passed
... universally been
... 73, 617 ; Bean
... 252 ; Some v.
... Oriental Bank
... 339 ; Danbury
... 213 ; repudiat-
... of the Connecticut
... Kent, in Rob-
... supra, between the

... without notice, at
... within the saving of the
... 65 Iowa, 193 ;
... purchase
... land at tax
... purchaser of land by
... a purchaser for
... 181 Mass.
... of course a pur-
... Holmes 48 N. H.

... without notice
... purchaser a perfect title
... from a member of a
... that will not make him
... common with the other part-
... Wilkerson, 63 Cal. 559.
... under a purchaser for
... the latter's
... 399 ;
... 158 ;
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The question now proposed for consideration is of the meaning of the words 'good consideration' in this statute. And here, at the outset, we have a striking instance of the application of the rule of construction of statutes passed for the repression of fraud; the rule, that is, of liberal construction. The word 'good' as a designation of consideration is, in its legal sense, used in distinction from and opposition to 'valuable;' and that this was true in the time of the statute is clear.¹ But the courts at once perceived that to give the word its technical meaning would well-nigh defeat the whole object of the Act; for it would save all voluntary conveyances made in good faith. Hence the word 'good' was construed from the first to mean 'valuable;'² and this has been the meaning always and everywhere given to it.³ Our own special statutes generally use the words 'valuable' or 'for value,' when they contain a saving clause.

The real question then is of the meaning of the word 'valuable' as applied to the term 'consideration' used in the stat-

v. Gibson, 116 Ill. 294; 2 *Pomeroy*, Equity, § 754.

If no title whatever was conveyed by the debtor, purchase for value in good faith from the grantee will be of no avail. *Neal v. Gregory*, 19 Fla. 356. That is the footing of the Connecticut rule above mentioned.

Recitals in the deed are not sufficient evidence of valuable consideration. *Kimball v. Fenner*, 12 N. H. 248; *Cohn v. Ward*, 32 W. Va. 34; *Rogers v. Verlander*, 30 W. Va. 619; *Baskins v. Shannon*, 3 Comst. 310; *Zelnicker v. Brigham*, 74 Ala. 598; *Houston v. Blackman*, 66 Ala. 559; *Bolling v. Jones*, 67 Ala. 508; *Hubbard v. Allen*, 59 Ala. 283; *Chambers v. Sallie*, 29 Ark. 407. 'No contract, sealed or unsealed, is sufficient of itself, unaided by other facts, to cover and protect fraud. *Feltz v. Walker*, 49 Conn. 93. Further see

Cruger v. Tucker, 69 Ga. 557; *Morse v. Wright*, 60 Cal. 260. It is sometimes held that such recitals may be conclusive of *want* of valuable consideration, in a contest with creditors. *Galbreath v. Cook*, 30 Ark. 417, citing *Butts v. Union Bank*, 1 Har. & G. 175, and *Davidson v. Jones*, 26 Miss. 63. Sed quære. Upon the general question of recitals of consideration see the important case of *Houston v. Blackman*, *supra*; also *Bigelow*, Estoppel, 477, 5th ed.

¹ See *Twyne's Case*, 3 Coke, 80.

² *Ib.* 81, b, where it is said: 'If consideration of nature or blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt.'

³ See e. g. *Copis v. Middleton*, 2 Madd. 410.

prevail, if there were no indication to the contrary, without the saving of the statute.¹

statute will apply to that of 27 Eliz. But the two statutes are not identical in language, or in meaning as meaning has recently been imputed to them. See *In re Ridler*, 22 Ch. D. 75, C. A.; *Green v. Paterson*, 32 Ch. D. 95, 104, C. A.; *Price v. Jenkins*, 4 Ch. D. 483; s. c. 5 Ch. D. 619. But see *Harris v. Tubb*, 42 Ch. D. 79. Further see *infra*, p. 449, note.

Under a former statute of Connecticut, which contained a saving of bona fide purchasers for valuable consideration, it was held that no title could be conveyed by a fraudulent grantee to any person, though for value and without notice. *Preston v. Crofut*, 1 Day, 527; *Merrill v. Meachum*, 5 Day, 341. So in *Roberts v. Anderson*, 3 Johns. Ch. 371; but this case was reversed in 18 Johns. 515. The court thought this the meaning too of the statute of 18th Eliz. (distinguishing that statute from 27 Eliz. c. 4) as to the construction of which no authorities were then known; the court supposing that the exception only saved the innocent purchaser from the penalties provided. And later the court felt compelled to put a case of purchase for value without notice on the footing of special facts showing an estoppel in pais, in order to save the purchaser. *Parker v. Crittenden*, 37 Conn. 148. The language of the Connecticut statute was changed in the revision of 1875; but this omits all saving. *Ante*, p. 39. As to purchase by creditors in Connecticut

see *Hamilton v. Staples*, 34 Conn. 316; *Washband v. Washband*, 27 Conn. 424.

The few early cases which held that fraud rendered a sale absolutely void, so that no title whatever could be passed to another, have all but universally been overruled. Vol. 1, pp. 73, 617; *Bean v. Smith*, 2 Mason, 252; *Somes v. Brewer*, 2 Pick. 198; *Oriental Bank v. Haskins*, 3 Met. 332, 339; *Danbury v. Robinson*, 1 McCart. 213; repudiating the distinction of the Connecticut court, and of Chancellor Kent, in *Roberts v. Anderson*, *supra*, between the 18th and 27th Eliz.

Purchase for value without notice, at tax sale, falls within the saving of the statute. *Most v. Henry*, 65 Iowa, 193; *Belcher v. Black*, 68 Ga. 93, purchase by wife of her husband's land at tax sale upheld. A purchaser of land by quit-claim may also be a purchaser for value. *Mansfield v. Dyer*, 131 Mass. 200. A mortgagee is of course a purchaser. *Plaisted v. Holmes*, 58 N. H. 619. Purchase for value without notice also gives the purchaser a perfect title although he buys from a member of a partnership; that will not make him tenant in common with the other partner. *Crites v. Wilkinson*, 65 Cal. 559.

A volunteer under a purchaser for value in good faith acquires the latter's title. *Samon v. Smith*, 58 Miss. 399; *Fulton v. Woodman*, 54 Miss. 158; *Craig v. Zimmermaer*, 87 Mo. 475. Not so of the original grantee. *Johnson*

¹ The saving is omitted from some of the statutes; but it is made by most courts as if it were not omitted. *Tierney v. Clafin*, 15 R. I. 220; *Leach v. Francis*, 41 Vt. 670; *Burgett v. Burgett*, 1 Ohio, 469; *Bancroft v. Blizzard*,

18 Ohio, 30; *Stover v. Harrington*, 7 Ala. 142, 151; *Governor v. Campbell*, 17 Ala. 566; *Ewing v. Runkle*, 20 Ill. 448; *Gridley v. Bingham*, 51 Ill. 153; *Farlin v. Sook*, 30 Kans. 401. As to the matter in Connecticut see note, *supra*.

The question now proposed for consideration is of the meaning of the words 'good consideration' in this statute. And here, at the outset, we have a striking instance of the application of the rule of construction of statutes passed for the repression of fraud; the rule, that is, of liberal construction. The word 'good' as a designation of consideration is, in its legal sense, used in distinction from and opposition to 'valuable;' and that this was true in the time of the statute is clear.¹ But the courts at once perceived that to give the word its technical meaning would well-nigh defeat the whole object of the Act; for it would save all voluntary conveyances made in good faith. Hence the word 'good' was construed from the first to mean 'valuable;'² and this has been the meaning always and everywhere given to it.³ Our own special statutes generally use the words 'valuable' or 'for value,' when they contain a saving clause.

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Cruger v. Tucker, 69 Ga. 557; *Morse v. Wright*, 60 Cal. 260. It is sometimes held that such recitals may be conclusive of *want* of valuable consideration, in a contest with creditors. *Galbreath v. Cook*, 30 Ark. 417, citing *Butts v. Union Bank*, 1 Har. & G. 175, and *Davidson v. Jones*, 26 Miss. 63. Sed quære. Upon the general question of recitals of consideration see the important case of *Houston v. Blackman*, *supra*; also *Bigelow, Estoppel*, 477, 5th ed.

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utes. It is believed that 'valuable consideration' in the statutes against fraudulent conveyances is to be taken (apart from its application to certain cases of pre-existing demands, of which later) in the widest sense of the law of contracts. It consists accordingly of some right, interest, profit, or in a word *benefit*, accruing to the vendor, *or* some forbearance, loss, or in a word *detriment* suffered by the purchaser.¹ It is not necessary that there should be 'quid pro quo,' or benefit of any kind,—here any more than elsewhere in contract, to make one a purchaser for valuable consideration. If A mortgage his land to B to secure him in lending money to C, though A has no benefit at all, B is a purchaser for valuable consideration.²

§ 2. 'VOLUNTARY' AND 'VALUABLE.'

But the terms 'benefit' and 'detriment' here used are technical terms, and the definition itself therefore requires explanation; and it will be well to go back to the word 'valuable' again. That word is generally and may always be used, in regard to statutes against fraudulent conveyances, in contrast with 'voluntary,' as in such expressions as 'transfers for valuable consideration' and 'voluntary transfers;' and it may be examined accordingly. Where shall we locate the line that separates the two?

The words are mutually exclusive of each other,³ and either might accordingly be considered first. 'Voluntary' is the simpler word, and may be profitably taken as the starting-point. The literal meaning of that word is at the very foun-

¹ *Currie v. Nind*, L. R. 10 Ex. 162. An attaching or, apart from statute, a judgment creditor is not a purchaser for value. Vol. 1, pp. 406, 407; *Devos v. Brandt*, 53 N. Y. 462; *Schweizer v. Tracy*, 76 Ill. 345, 351; *Berry v. Sowell*, 72 Ala. 14.

² Ex parte *Hearne*, 1 Buck, 165; *Marden v. Babcock*, 2 Met. 99.

³ Hence mere 'good' or 'meritorious' considerations are voluntary; though 'meritorious' considerations appear formerly to have been treated as if they were valuable. Ante, pp. 186, 190.

dation, and makes most though not all of the superstructure, of the legal idea intended by it; a transfer is 'voluntary' when it is solely of the will of the person making it, that is to say, when his own will is the only motive for the transaction.¹ It is not true however that where other motives enter into it the transfer is for valuable consideration; so that in the literal sense of the word 'voluntary' the two terms are not mutually exclusive of each other.²

The most important kind of voluntary transfer is however pointed out when a transfer, made solely of the will of the person making it, has been mentioned. What other kinds are there? Perhaps they may all be comprehended in this statement, that though a transfer is induced by motives taking their rise in the conduct or action, past or to come, of the transferee, *that* will not affect the character of the transfer. Unless there is something more, the transfer will still be voluntary; and that will continue to be true until the transfer is either made with a view to the 'benefit' of the party who transfers, or is made to the 'detriment' of the opposite party. When that point is reached, there is, within accepted definition, a valuable consideration. 'Benefit' appears to mean advantage *bargained for* (in favor of the person making the transfer) in the transaction; 'detriment' is a more difficult

¹ A sale of a large property, on credit, to a person without present or prospective means is practically a voluntary alienation, in ordinary cases. *Gregg v. Lee*, 37 La. An. 164; *Reeves v. Sherwood*, 45 Ark. 520; *Massie v. Enyart*, 32 Ark. 251; *Ringgold v. Waggoner*, 14 Ark. 69. See *Leach v. Fowler*, 22 Ark. 143; *Gist v. Barrow*, 42 Ark. 521; *Bell v. Devore*, 96 Ill. 217; *Jaffers v. Aneals*, 91 Ill. 487; *Perkins v. Webster*, 2 Cush. 480; *Peebles v. Horton*, 64 N. Car. 374; *Davidson v. Crittenden*, 55 Ga. 497; *Whelan v. McCreary*, 64 Ala. 319;

Earnshaw v. Stewart, 64 Md. 513; *Beasley v. Bray*, 98 N. Car. 266, that a conveyance by an insolvent debtor to an insolvent grantee, not on long credit, is not fraudulent per se.

² It does not make a conveyance voluntary that a debtor pays over a fund to his creditor (a surety to his principal, for example), who at once turns over the fund to some one to whom the debtor was in way bound. *Berry v. Sowell*, 72 Ala. 14. But such a transaction would bear examination; it may not have been more than a subterfuge.

term to tie down to a definition, and must be left to examples. The meaning of both 'benefit' and 'detriment,' which must now be considered, will sometimes be involved in the same transaction.

The following specific proposition, it is believed, is supported by the better authorities: If the purpose of the transaction is to confer a benefit or an advantage, as e. g. out of affection, generosity, or the like, it matters not that the transaction takes the form of an agreement, and that the party to receive the advantage promises, or takes upon himself a duty, to do something involving time, labor, or expense, or all three, in the way of carrying out the purpose; so long as nothing is done or undertaken by the recipient except to make good the terms of the benefit as a gratuity, the transaction still is voluntary on the part of the one conferring the benefit.¹ In one of the cases just cited,² as stated in one

¹ *Kirksey v. Kirksey*, 8 Ala. 131; *Forward v. Armstead*, 12 Ala. 124; *Erwin v. Erwin*, 25 Ala. 241; *Bibb v. Freeman*, 59 Ala. 612; *Van Wyck v. Seward*, 18 Wend. 286; *Randall v. Vroom*, 30 N. J. Eq. 353; *Nichols v. McCarthy*, 53 Conn. 299; *McCutcheon's Appeal*, 99 Penn. St. 133; *Lyon v. Haddock*, 59 Iowa, 682; *Tyler v. Tyler*, 126 Ill. 525; *Park v. Battey*, 80 Ga. 353; *Lewis v. Linscott*, 37 Kans. 379; *Benson v. Benson*, 70 Md. 253; *In re Ridler*, 22 Ch. D. 74 C. A.; *Green v. Paterson*, 32 Ch. D. 95, 104, C. A.; *Townend v. Toker*, L. R. 1 Ch. 452; *Rosher v. Williams*, L. R. 20 Eq. 210; *Gardiner v. Gardiner*, 12 Ir. C. L. R. 565; *Lee v. Mathews*, 6 L. R. Ir. 530, C. A. reversing 6 L. R. Ir. 167.

not without distrust, *Price v. Jenkins*, 5 Ch. D. 619, C. A. ('Can an assignment of leasehold property ever be strictly voluntary?' said James, L. J. in that case); s. c. 4 Ch. D. 483. *Price v. Jenkins* however arose under 27 Eliz. c. 4, and, until *Harris v. Tubb*, has always been confined to that statute. See *In re Pumfrey*, 10 Ch. D. 626, C. A., where James, L. J. himself says that *Price v. Jenkins* was decided upon that statute, 'and the object of it was to prevent a fraud;' *In re Ridler*, supra; *Green v. Paterson*, supra. See *Lee v. Mathews*, supra. The question in *Harris v. Tubb*, as in *Price v. Jenkins*, was whether an assignment of leaseholds, on consideration of natural love and affection, was voluntary. It was held, under 13 Eliz. c. 5, that it was not, on the ground that the assignee took the burden of liabilities from the assignor. The cases of *Dozier*

But see *Dozier v. Matson*, 94 Mo. 328, ante, p. 182, note; *Harris v. Tubb*, 42 Ch. D. 79, before a single judge (*Kekewich, J.*), following, though

² *Kirksey v. Kirksey*.

of the others,¹ a brother-in-law wrote to the widow of his brother, who lived some sixty miles away, that if she would come to see him, he would let her have a place to help her bring up her family. Shortly afterwards the widow broke up her old place of residence and removed to the residence of her brother-in-law. For two years he furnished her with a comfortable home, and then required her to give it up. The promise was held gratuitous, though the sister-in-law had, in consequence, sustained the loss and inconvenience of breaking up and moving.²

In another case³ in the same state it appeared that a father, residing in Alabama, promised his son, who lived in North Carolina, a particular plantation in Alabama if he would come there and settle upon it. The son did so, giving up his residence in North Carolina at a loss, and being put to expense and inconvenience in making the change. The promise in this case also was held gratuitous; the court declaring that expense and trouble in such a matter could not make a consideration, for such things might attend any

v. Matson, 94 Mo. 328, and *Dougherty v. Harsel*, 91 Mo. 161, should stand upon the ground that the donor was able to make the gift, not that the acts of the donee (making improvements) made the transaction one for value.

It does not make the conveyance valuable that the grantee undertakes to pay some debts of the grantor, except to the extent of payment. See *Lewis v. Linscott*, 37 Kans. 379; *Benson v. Benson*, 70 Md. 253. If the debts are equal to the value of the estate, a bona fide undertaking, by a responsible person, to pay them would perhaps make the purchase valid. *Nicholls v. Ellis*, 98 Mo. 344. It would be different if the grantee were a person without means. *Supra*, p. 445, note. Though even in that case the creditor could elect, no doubt, to treat the grantee,

upon his undertaking, as *his* debtor, and proceed against him and take the land in execution, in those states in which a promise to one man for the benefit of another may be sued upon by the latter. See chapter 6, § 16.

¹ *Bibb v. Freeman*, *supra*.

² *Townend v. Toker*, L. R. 1 Ch. 446, was a case in some of its more general features like this one, with a contrary result; but in that case there was a plain bargain from the very outset between the parties, without suggestion of a gift or gratuity. It may be added that that case arose under 27 Eliz., the doctrine of which, as has already been said, is somewhat special. See further chapter 21, where *Townend v. Toker* is more fully stated.

³ *Forward v. Armstead*, 12 Ala. 124.

gratuity; the test was whether the property was 'to be *paid* in consideration of the removal, instead of being given from motives of benevolence, kindness, or natural affection.'¹

In a New York case² it appeared that a father had made a conveyance of real estate to his son, requiring the son to pay his sisters such a sum as the father should decide to be their portions of the estate. Though the son by accepting the conveyance became liable to pay his sisters according to the undertaking, the conveyance was held to be voluntary on the part of the father; for it was the manifest intention of the father to dispose of the property to and among his children from motives of affection. And so it has been held in Pennsylvania of one to whom a life insurance policy was assigned, and who thereafter paid the premiums as they became due; that did not make him a purchaser for value.³

Indeed the question in such cases appears to come to this, whether the transaction amounted to a bargain or was only a gift; if it was intended as a gift, the fact that the donee was put to inconvenience, trouble, and expense in accepting it does not make him a purchaser for value under the statute of Elizabeth,—the conveyance still is voluntary; if the conveyance, on all the facts, is to be treated as an intended bargain and sale, the very same circumstances of inconvenience, trouble, and expense, or any of them, would make a case of purchase for value under the statute. So in effect it was laid down in an important Alabama case,⁴ to which refer-

¹ See also *Townend v. Toker*, L. R. 1 Ch. 446.

² *Van Wyck v. Seward*, 18 Wend. 386, Court of Errors.

³ *McCutcheon's Appeal*, 99 Penn. St. 133.

⁴ *Bibb v. Freeman*, 59 Ala. 612. In this case the court says: 'The conveyance refers to the contemporaneous agreement between the donor and . . . the donee. . . . It is shown that that agreement was in writing and has been lost.

Its terms, according to the evidence of the donor and one of the donees, . . . were that R should remain on the lands conveyed and superintend their cultivation and that of two other plantations, the property of the donor. The fact is not distinctly stated, but it is a necessary inference from the facts stated that each of these three plantations was supplied with hands and every other necessary appliance for cultivation, the property of the donor. In their culti-

ence has already been made; and so it is laid down in other cases of authority.¹

But unless the term is used in a special sense, 'bargain' alone would not include valuable consideration. Thus an agreement by a grantee of land to build a house thereon would not create a valuable consideration for the conveyance.² If however one should 'sell' part of a tract of land in or near a city, solely upon the 'buyer's' undertaking to build a house or otherwise to improve his 'purchase' at very large expense,

vation R was to contribute no more than his personal services in superintending them. From all three plantations he was to receive one fifth of the products of cultivation; receiving no more from the cultivation of the lands conveyed than from the plantations not conveyed. If compensation was intended to be paid him for removing from his home in T to the lands conveyed, for loss and inconvenience sustained in the removal, for personal services rendered or to be rendered, it was to be derived from the share of the products of the several plantations to which the agreement entitled him. We cannot regard these facts as forming part of the consideration of the conveyance of the lands.' The conveyance was held to be a fraud upon the creditors.

¹ *Townend v. Toker*, L. R. 1 Ch. 452; *Rosher v. Williams*, L. R. 20 Eq. 210; *Lee v. Mathews*, 6 L. R. Ir. 530. In the first of these cases, Turner, L. J. said: 'The question is, whether the transaction was one of bargain, or of gift merely.' In *Lee v. Mathews*, *supra*, in the Court of Appeal, May, C. J. says: 'The question to be decided in each case of this nature is, as was said in *Townend v. Toker*, L. R. 1 Ch. 452 [on 27 Eliz. c. 4], was the dealing a bargain or a gift? The existence of onerous liabilities, from which the

assignee covenants to indemnify the assignor, may give the transaction of transfer the character of a bargain for good and valuable consideration, as was held in that case. On the other hand the gift of a valuable interest in lands is not less a gift because the property so given carries with it certain obligations.' Fitzgibbon, L. J.: 'The question nevertheless arises with regard to a leasehold, as it does with regard to other property, whether the transaction was a bargain involving mutual considerations, or was a gift involving mere bounty from one party to the other.' See to the same effect (on authority of *Townend v. Toker*, *supra*), *Rosher v. Williams*, *supra*, also on 27 Eliz. c. 4, where the grantee agreed to build a house on the land conveyed, and that was held not to make a valuable consideration.

It seems that whenever equity would decree specific performance, a conveyance will be good against creditors. *Moog v. Farley*, 79 Ala. 246. Comp. *Rosher v. Williams*, L. R. 20 Eq. 210; *Clarke v. Willott*, L. R. 7 Ex. 313; *Peter v. Nicolls*, L. R. 11 Eq. 391; *Smith v. Garland*, 2 Mer. 123; *Trowell v. Shenton*, 8 Ch. D. 318. These English cases are on 27 Eliz. c. 4.

² See *Rosher v. Williams*, L. R. 20 Eq. 210.

the understood object being to enhance the value of the rest of the seller's land, building the house or making the outlays would, it seems, be both 'detriment' and 'benefit;' the buyer would probably become a purchaser for value against the seller's creditors.¹ Of course if it were made a *condition* that the conveyance should be void if the house were not built, the case would be clear; the condition could be enforced.²

It remains to consider the special cases relating to purchase for value.

§ 3. TRUSTEES AND ASSIGNEES FOR CREDITORS.³

What is the relation, towards property assigned for the benefit of creditors generally or of particular creditors, of an assignee or trustee, whether in virtue of the actual stipulations made by him with the debtor, or of the duties laid upon him by law, in taking the trust? Some courts hold the assignee or trustee to be a purchaser for value;⁴ more hold the contrary.⁵ The first named view cannot be supported on the

¹ Rosher v. Williams, *supra*.

² *Ib.*

³ As to assignees for value see *infra*, § 4.

⁴ Wickham v. Martin, 13 Gratt. 427; Sipe v. Earman, 26 Gratt. 563; Harrison v. Farmers' Bank, 9 W. Va. 424; Gates v. Lebeaume, 19 Mo. 17, 26; Byrne v. Becker, 42 Mo. 264; State v. Keeler, 49 Mo. 548; First National Bank v. Hughes, 10 Mo. App. 7; Wilson v. Eifler, 7 Coldw. 31; Thomas v. Clark, 65 Maine, 296; Governor v. Campbell, 17 Ala. 566; Fox v. Willis, 1 Mich. 321; Hollister v. Loud, 2 Mich. 309. But the dicta of the Michigan cases have been overruled. Pierson v. Manning, 2 Mich. 445; Farrington v. Sexton, 43 Mich. 454; Wakeman v. Barrows, 41 Mich. 363. Between the parties the consid-

eration may be treated as valuable where the instrument is under seal, as usually it is; but it is better in such a case to say that no consideration is necessary.

⁵ Swan v. Crafts, 124 Mass. 453; Holland v. Cruft, 20 Pick. 321, 338; Palmer v. Thayer, 28 Conn. 237; Loos v. Wilkinson, 110 N. Y. 195 (s. c. 113 N. Y. 485); Putnam v. Hubbell, 42 N. Y. 106, 114; Griffin v. Marquardt, 17 N. Y. 28; Farrington v. Sexton, 43 Mich. 454; Lampson v. Arnold, 19 Iowa, 479; Ruble v. McDonald, 18 Iowa, 493; Main v. Lynch, 54 Md. 658; Eigenbrun v. Smith, 98 N. Car. 207; Savage v. Knight, 92 N. Car. 493; Fleming v. Grafton, 54 Miss. 79; Craft v. Bloom, 59 Miss. 69; Mann v. Flower, 25 Minn. 500. See Benning v. Nelson, 23 Ala. 801. Of course a

ground of burdens, or 'detriment,' assumed by the party in the performance of the trust; if at all events what has been said in preceding pages is a sound view of law.¹ The fact that a donee of property undertakes to improve it, or to clear it of encumbrances for himself, or that he undertakes to transfer it, or to divide it and transfer it,² for himself or for the donor after he has had certain benefits from it, — that would not make him a purchaser for value.³

Again such trustee or assignee cannot be a purchaser for value if he is to be deemed, as he is in England, only an agent of the debtor, concerned with the execution of a power. In that case his powers are revocable by the principal at any time before they have been acted upon by those intended, the creditors.⁴ And even after creditors have accepted the terms of the deed, the trustee, for a reason mentioned in the next paragraph, cannot be a purchaser for value from him, however true it is that the assenting creditors can enforce performance of the trust. The *creditors* may become purchasers for value, by taking the property and releasing their debts correspondingly; but the trustee stands in a different place, so far as he is only trustee.

But in America generally the trustee or assignee is not deemed to stand in the position of agent of the debtor; the execution of the deed is at the outset more than a revocable power, — it is in itself a trust, and hence cannot be revoked by the debtor.⁵ The trustee therefore acquires an indepen-

grantee in secret trust for the grantor is no purchaser or owner against creditors, for the purpose of acquiring title by adverse possession. *Jones v. Wilson*, 69 Ala. 400.

¹ See *Swan v. Crafts*, *supra*.

² *Van Wyck v. Seward*, 18 Wend. 386, *supra*, p. 448.

³ The mere fact however that a man is an assignee will not prevent him from being a purchaser for value. *Can-*

non v. Young, 89 N. Car. 264; *infra*, pp. 453 et seq.

⁴ *Garrard v. Lauderdale*, 3 Sim. 1; s. c. 2 Russ. & M. 451; *Walwyn v. Coutts*, 3 Meriv. 707; s. c. 3 Sim. 14; *Acton v. Woodgate*, 2 Mylne & K. 492. So in some of our states. *Ashley v. Robinson*, 29 Ala. 112; *Ruble v. McDonald*, 18 Iowa, 493.

⁵ *Moses v. Murgatroyd*, 1 Johns. Ch. 119, 129; *Shepherd v. McEvers*, 4

dent position; does that fact, together with the fact of the duties assumed by or imposed upon him make him a purchaser for value? It is believed not. The trustee does not, properly speaking, purchase the property;¹ he merely undertakes to do certain things with it which the deed authorizes him to do. If the occasion for doing those things does not arise, or if it is frustrated, the property is still in the debtor; and if there is any surplus, after the trust has been performed, that surplus is the property of the debtor, and no conveyance of it is necessary.² There is, or there may be, a valid *contract* in these cases, especially where it is under seal, or where property is turned over to the trustee under the agreement; but there is no purchase for value, in the sense of the statute of Elizabeth.

The assignment will however be good, in principle, if it has been executed in accordance with law, so far as its provisions and the acts of the assignor are concerned, though it has been made with an actual intention to delay or defraud certain creditors;³ because in such a case the assignment

Johns. Ch. 136, 138; Nicoll v. Mumford, ib. 522, 529; Ward v. Lewis, 4 Pick. 518, 523; New England Bank v. Lewis, 8 Pick. 113, 118; Pingree v. Cumstock, 18 Pick. 46, 50; Read v. Robinson, 6 Watts & S. 329; Ingram v. Kirkpatrick, 6 Ired. Eq. 463; Stimpson v. Fries, 2 Jones, Eq. 156; 2 Pomeroy, Equity, § 994. See Goodwin v. Kerr, 80 Mo. 276. But see Gibson v. Rees, 50 Ill. 383. There is some conflict of authority upon the question whether the creditor must signify his acceptance by some word or act, or whether his acceptance is presumed. 2 Pomeroy, § 993, note. See also Benning v. Nelson, 23 Ala. 801, in which it is declared that the law will not presume the assent of a beneficiary, however much the instrument may be for his benefit, because that would be to

put it in the power of the debtor, by the aid of a legal presumption, to make valid his own fraudulent deed. But of course the presumption at most could only be *prima facie*. Further see Evans v. Lamar, 21 Ala. 333.

¹ Except perhaps in the bare sense of taking, for a time, the legal title. 'An assignment is no more a sale than is a mortgage, both of which are transfers of the present dominion over the property,' etc. Goodwin v. Kerr, 80 Mo. 276, 281.

² It is common to say that the surplus 'results' to the debtor by operation of law; but that is a convenient euphemism to express the same idea.

³ Emerson v. Senter, 118 U. S. 1; Hempstead v. Johnston, 18 Ark. 123, 140; Cornish v. Dewa, ib. 172, 181; Hunt v. Weiner, 39 Ark. 70, 75;

amounts only to a preference of creditors, not because of purchase for value by the assignee.

It is hardly necessary to say that it does not require any doctrine of purchase for value to sustain the assignment, against the *debtor*, as soon as the trust is executed on his part. If the trust were executory on the part of the debtor, it could not be enforced against him; but a trust fully executed by the founder is binding against him as well where it is voluntary as where it is for value.¹ Nor is there any difference in this respect, or in regard to the general question whether the trustee or assignee is a purchaser for value, between assignments for creditors generally or for particular creditors on the one hand, and technical deeds of trust for like purpose on the other.

§ 4. ASSIGNEES OF CHOSSES IN ACTION.

It is a fundamental rule of law, whatever may be the true reason for it, that an assignee of a chose in action takes subject to all equities or defences that existed at the time of the transfer in favor of him against whom the obligation runs. It matters not that the assignee has taken without notice (other than that implied by an assignment) and for valuable consideration; unlike a purchaser acquiring the legal title to property in possession, the assignee has acquired only a right

Thomas v. Talmadge, 16 Ohio St. 433, 439; Governor v. Campbell, 17 Ala. 566; State v. Keeler, 49 Mo. 548. But see Savage v. Knight, 92 N. Car. 493; Putnam v. Hubbell, 42 N. Y. 106, 114; Loos v. Wilkinson, 110 N. Y. 195; s. c. 113 N. Y. 485.

Preference stands upon a footing of its own. See chapter 19, § 1.

¹ Ellison v. Ellison, 6 Ves. 656; Bill v. Cureton, 2 Mylne & K. 503; Petre v. Espinasse, ib. 496; Milroy v. Lord, 4 De G. F. & J. 264, 274; Young v. Young, 80 N. Y. 422; Martin v. Funk,

75 N. Y. 134, 137; Estate of Webb, 49 Cal. 541, 545; Stone v. Hackett, 12 Gray, 227; Bond v. Bunting, 78 Penn. St. 210; and many other cases. Equity will not enforce a voluntary executory trust in favor even of a wife or child. Young v. Young, *supra*; Holloway v. Headington, 8 Sim. 325; Jefferys v. Jefferys, 1 Craig & P. 138, 141; Story, Equity, §§ 433, 987. The law was otherwise on this last point at one time. Story, *ut supra*; ante, pp. 186, 190.

of action or an equitable title. Thus a mortgage, at least as regards the debt secured by it, is a chose in action; and therefore an assignee cannot acquire a better right against the mortgagor than the mortgagee had; payment of value in good faith will not make him a purchaser for value in good faith within the meaning commonly attached to that phrase.¹

It should well be observed however that the rule is, that the assignee takes subject to equities in *favor* of the debtor in the obligation assigned. The rule is not that the assignee takes subject to equities against the debtor; and it is apprehended that there is no rule that an assignee for value, and without notice of such equities, takes subject to such equities. Clearly if the true view is, that the distinction in regard to assignment is founded upon the fact that assignment is an attempt to transfer to a third person a personal relation and duty existing between two men,² no one but one of those two men has anything to say about the transaction, when it is for value and in good faith. But though the commonly accepted distinction should be the true one, namely, that assignments tend to promote litigiousness,³ what have third persons to do with the matter when it falls short of crime?

This reasoning leads to the conclusion that creditors of the person against whom the chose in action exists have no concern with any intent of such person to defraud them, though the holder of the chose be equally guilty, after the chose has been assigned for valuable consideration without notice of the fraud; towards creditors it is in effect the ordinary case of *purchase* for value without notice. This is believed to be a general proposition; it has been decided to be true of the assignment of a mortgage,⁴ and there is nothing in such a

¹ Conover v. Van Mater, 3 C. E. Green, 481; De Witt v. Van Sickle, 29 N. J. Eq. 209; Westfall v. Jones, 23 Barb. 9; Hill v. Hoole, 115 N. Y. 299; Judge v. Vogle, 38 Mich. 569.

² Harvard Law Rev. for March, 1890, p. 339, Professor Ames.

³ *Ib.*; Lampet's Case, 10 Coke, 48.

⁴ De Witt v. Van Sickle, 29 N. J. Eq. 209; Sleeper v. Chapman, 121

case to distinguish the transaction from the effect of assigning any other chose in action, governed by common law principles. Indeed most of the American statutes themselves show this, for they expressly include choses in action among the subjects of fraudulent conveyance, and then save *generally* purchasers for value in good faith. That must include the purchasers of the same subjects of the statutes.¹

Whether this proposition would apply to choses in action not governed by common law principles may be a different question. It is conceived that it should apply to the assignment of an unnegotiable promissory note; such an instrument of the *lex mercatoria* differs but slightly from a common law chose in action. Different considerations may be thought to enter into the question when the instrument is negotiable. A promissory note payable to the 'order' of a person named cannot be perfectly transferred except by indorsement made by the payee.² Without his indorsement a transfer though for value, and without notice in point of fact, would not pass a title such as the law merchant recognizes; a better way is provided and should be adopted. This may

Mass. 404; *Bigelow v. Smith*, 2 Allen, 264, 266; *Welch v. Priest*, 8 Allen, 165 (purchaser). But see *Judge v. Vogel*, 38 Mich. 569. An assignee for value of a mortgage will take over a prior assignee in fraud, though taking with notice. *Clapp v. Leatherbee*, 18 Pick. 131.

¹ It is different with the statute of Elizabeth. That does indeed in terms embrace certain choses in action, — 'every bond, suit, judgment, and execution,' ante, p. 30, — but the saving is only of 'any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels.' Ante, p. 32. For a considerable time indeed the courts excluded all choses in action not mentioned by the

statute, including one (bonds) there mentioned, on the ground that they could not be taken on execution. Ante, pp. 68 et seq. Modern legislation has remedied this, and brought all choses within the statute; but it may still be a question whether choses are within the saving of that statute. If assignees for value are saved, where the statute of Elizabeth prevails, as in New Hampshire, Massachusetts, and Pennsylvania, it should be so on the equity of the general doctrine of purchase for value.

² *Lancaster Bank v. Taylor*, 100 Mass. 18; *Whistler v. Forster*, 14 C. B. N. s. 248. These cases show that the title transferred in such a case, without indorsement, is only an equitable title.

possibly be considered sufficient to distinguish such a case from that of the assignment of a common law chose in action (the assignment of which is in conformity with law), so as to let in the rights of creditors whom the maker of the note has been endeavoring to defraud. That would be somewhat analogous to the rule, as generally laid down, that purchase for value even of property in possession must be purchase of the legal title.¹ It may be thought too that there is some analogy between the case under consideration and that of a grantee of land who fails to perfect his title, by omitting to have it recorded, and so runs the risk of losing it.

§ 5. SUPPORT.

The courts are not agreed in regard to the effect of undertakings by a grantee to support a debtor-grantor by way of consideration for the conveyance of all or a large part of the grantor's estate. In New York, Illinois, and elsewhere, it is held that such a case does not make the valuable, or rather the valuable and bona fide, consideration required by the statute to cut off the claims of creditors of the grantor.²

¹ *Parker v. Clark*, 30 Beav. 54; *Wailes v. Cooper*, 24 Miss. 208. But see *French v. Hope*, Pump Court, vol. 4, p. 158, coram Kekewich, J.; also 1 *Harvard Law Rev.* 1.

² *Coleman v. Burr*, 93 N. Y. 17; *Robinson v. Stewart*, 10 N. Y. 189, 195; *Goodrich v. Downs*, 6 Hill, 438; *Jackson v. Parker*, 9 Cowen, 84; *Lawson v. Funk*, 108 Ill. 502; *Moore v. Wood*, 100 Ill. 451; *Annis v. Bonar*, 86 Ill. 128; *Woodward v. Wyman*, 53 Vt. 645; *Tupper v. Thompson*, 26 Minn. 385 (personalty); *Henry v. Hinman*, 25 Minn. 199; *Graves v. Blondell*, 70 Maine, 190; *Egery v. Johnson*, 70 Maine, 258; *Sidensparker v. Sidensparker*, 52 Maine, 481; *Hapgood v. Fisher*, 34 Maine, 407; *Smith v. Smith*,

11 N. H. 460; *Rynearson v. Turner*, 52 Mich. 7; *Park v. Battey*, 80 Ga. 353; *Worthy v. Brady*, 91 N. Car. 265; *Candler v. Cobb*, 77 N. Car. 30; *Carmack v. Lovett*, 44 Ark. 180; *Stokes v. Jones*, 18 Ark. 734; *Woodall v. Kelly*, 85 Ala. 368; *Sandlin v. Robbins*, 62 Ala. 477. See also *Rice v. Cunningham*, 116 Mass. 466; *Miner v. Warner*, 2 Grant's Cas. 448 (but see *Shontz v. Brown*, 27 Penn. St. 123).

The fact that the grantee assumed the payment of some debts of the grantor, or performed some considerable services, would not help the matter. *Graves v. Blondell*, *supra*; *Carmack v. Lovett*, *supra*; *Park v. Battey*, *supra* (conveyance by husband to wife in consideration of love and affection, support of

Thus in a late case¹ it appeared that a husband had conveyed land to his wife in consideration of an agreement on the part of his wife to take care of the grantor's mother; and it appeared that the wife had carried out her agreement, having rendered services in the care of her husband's mother for more than eight years. But the court refused to treat the transaction as valid against the husband's creditors, though in point of fact there may have been no intent to defraud them. But a contrary rule obtains in some other states, if at all events support does not constitute the sole consideration.²

The exclusion of such a consideration should not rest upon the ground that it may not be valuable, but rather on the ground that, being in effect of the nature of a trust or reservation to the exclusion of creditors or of a trust or a reservation in favor of some one apparently having no estate in the property, and seldom appearing of record, the consideration lacks good faith.³ This is shown directly by some of the

the grantor, and payment of certain debts); *Benson v. Benson*, 70 Md. 253 (undertaking to pay an annuity to the grantor, if required, and to pay debts of the grantor less than half the value of the property). So though some small present payment of money was made. *Egery v. Johnson*, *supra*; *Sidensparker v. Sidensparker*, *supra*; *Moore v. Wood*, 100 Ill. 451; *Rynearson v. Turner*, *supra*. But see *In re Johnson*, 20 Ch. D. 389.

¹ *Coleman v. Burr*, *supra*.

² *Hennon v. McClane*, 88 Penn. St. 219; *Shontz v. Brown*, 27 Penn. St. 123; *Stafford v. Stafford*, *ib.* 144; *Pelham v. Aldrich*, 8 Gray, 515; *Hays v. Montgomery*, 118 Ind. 91; *Willis v. Thompson*, 93 Ind. 62; *Scott v. Davis*, 117 Ind. 232; *Aultman v. Booth*, 95 Mo. 383; *Muenks v. Bunch*, 90 Mo. 500; *Henderson v. Hunton*, 26 Gratt. 926; *Gordon v. Reynolds*, *supra*; *Farlin v. Sook*, 30 Kans. 401; *Easum v. Pirtle*, 81 Ky. 561; *In re Johnson*, *supra*. See

Wheeler v. Wallace, 53 Mich. 356, 362, lease of lands on boarding lessor.

It is held in *Tibbals v. Jacobs*, 31 Conn. 428, that an absolute conveyance (by quitclaim) is not in fraud of creditors, where the grantee, though by secret agreement, is in good faith to furnish money to pay the grantor's debts, the grantor to remain in possession and have the use of the land for his support, the grantee to make up any deficiency required. But this case appears to conflict, in its principle, with *Lukins v. Aird*, 6 Wall. 78.

The retaining possession of *land* after sale, it should be remembered, apart from questions touching secret agreements or trusts for support or the like, rests upon a different footing from retaining possession of chattels sold. See chapter 13, § 5.

³ See *Cansler v. Cobb*, 77 N. Car. 80; *Gordon v. Reynolds*, 114 Ill. 118; *Moore v. Wood*, 100 Ill. 451; *Annis*

cases,¹ and indirectly by others.² The real question then is, whether the nature of the proposed consideration should fix upon the grantee the duty of inquiry concerning the effect of the transaction.³

These cases of conveyances on consideration of support of the grantor are at all events distinguishable from cases in which there has been a valid agreement for the payment of services. In a case of that sort payment for the services rendered must be made; and these of course having been bargained for will constitute a valuable consideration for property conveyed in payment. Thus, where a father prom-

v. Bonar, 86 Ill. 128; *Rice v. Cunningham*, 116 Mass. 466; *Woodall v. Kelly*, 85 Ala. 368; *Sandlin v. Robins*, 62 Ala. 477; *Lukins v. Aird*, 6 Wall. 78. In *Annis v. Bonar* the court says: 'It is [a doctrine bearing its own condemnation] that a debtor may transfer all his property to another, and thereby defeat his creditors . . . and yet enjoy the use of the property. The size of the family, the value of the property disposed of, and the amount and character of the debts are obviously immaterial, since the proposition admits of no limitations in these respects. If the debtor may take a covenant for support and maintenance, he may prescribe even to the minutest detail the kind and quality. And thus property of immense value might be transferred so as to secure a life support corresponding in expense. . . . The law allows no man, beyond the specific exemptions of the statute, by any form of contract or mode of disposing of property, whatever it may be, to secure the use of his property to himself to the exclusion of his creditors.' So in *Lukins v. Aird*, *supra*, a different sort of case, but involving the same question of consideration, the court says that the consideration may be considered valuable, 'but it lacks the

element of good faith.' See chapter 19.

In *Scott v. Davis*, 117 Ind. 232, it is said that the case is not one of secret trust in favor of the grantor.

Further see *Ryan v. Mullinix*, 45 Iowa, 631; *Farlin v. Sook*, 30 Kans. 401, that the creditors may appropriate the value of the land in excess of the value of the consideration actually paid and discharged.

If however enough was left of the grantor's property to pay his debts, it is probable that the conveyance might be sustained. The cases speak of conveyances by insolvents, or of the debtor's entire estate which comes to the same thing. *Rollins v. Mooers*, 25 Maine, 192; *Webster v. Whitney*, *ib.* 326; *Egery v. Johnson*, 70 Maine, 258; *Graves v. Blondell*, *ib.* 190.

¹ See *Rice v. Cunningham*, *supra*; *Strong v. Lawrence*, 58 Iowa, 55, citing *Sidensparker v. Sidensparker*, 52 Maine, 481; *Macomber v. Peck*, 39 Iowa, 351; *Graham v. Rooney*, 42 Iowa, 567, that where there is a secret trust of the kind the conveyance is invalid against creditors. See also *Slater v. Dudley*, 18 Pick. 373.

² *Gordon v. Reynolds*, *supra*.

³ *Canaler v. Cobb*, 77 N. Car. 30.

§ 6.] THE SAYING: VALUABLE CONSIDERATION.

ises his daughter over age, or one under age upon whom is dependent, that she shall be compensated for services his family to be rendered by her, he may, after the services have been performed, convey to her land in payment; and the conveyance will be good against his creditors.¹ In case of that kind, where the services of another have been obtained for in good faith, for work to be done, it can make no difference that the employer was embarrassed at the time payment must be made.

§ 6. PRE-EXISTING DEMANDS.

The courts of New York and of some other states hold that, to constitute a valuable consideration in the matter of the transfer of property other than negotiable paper, the consideration must be a present one, specifically created; a pre-existing debt or obligation alone² is insufficient to make him who takes the property in discharge of the debt or obligation a purchaser for value; though his claim to it may be good on the footing of preference. One who, for such pre-existing debt, takes property from another whose title is tainted with fraud (or whose act is a fraud) upon another cannot, on the footing of purchase for value, hold the property against the person upon whom the fraud was practised.³ But that is contrary to the doctrine which obtains in England, and more generally in this country.⁴

¹ Collier v. French, 64 Iowa, 577; Howard v. Ryneason, 50 Mich. 307.

Ordinarily the performance of services by a child for his parents, all living together, would not raise an implied promise to pay for the same. Howard v. Ryneason, supra.

² If there be with it a valuable consideration, the transfer will stand. Rankin v. Van Biver, 78 Ala. 562. Such valuable consideration paid to the debtor will not be treated as a benefit or trust in his favor, so as to avoid the transaction, though the debtor was insolvent. *Ib.*

³ Vol. 1, pp. 405, 406; Barnard v. Campbell, 58 N. Y. 78; Moore v. Rader, 65 N. Y. 438; Stevens v. Brenna, 79 N. Y. 254; Proskauer v. People's Bank, 77 Ala. 257; Curme v. Rau, 100 Ind. 247; De Witt v. Van Sickel, 29 N. J. Eq. 209; Thompson v. Furber, 57 Miss. 478; Surget v. Boyd, *ib.* 48. The two Mississippi cases are cases of security taken for the prior debt.

⁴ Taylor v. Blakelock, 32 Ch. 1560, C. A. quoted vol. 1, p. 405; Merchants' Insurance Co. v. Abbott, 11 Mass. 397, 400; Morse v. Aldrich, 11

The courts of England and more generally of this country use 'valuable consideration,' it is believed, in its broadest sense, where that has not been restricted by force of statute, making no exception in its application to questions arising under the statute of Elizabeth; he who as an owner, and not merely as agent or trustee, takes property in payment of a pre-existing demand, whether in absolute or conditional payment, or who in the same way takes property as security¹ for the payment of such a debt, takes for valuable consideration as well under the statute as in other cases. This too is true without regard to the law of preference. Thus: A conveys property to B in fraud of his creditors, B participating or taking as a volunteer; B now conveys the same property to his own creditor C, without notice of the fraud, in payment of or as security for the debt due C. C is a purchaser for valuable consideration in the fullest sense in a contest with the creditors of A. If C took the property in discharge of the debt, it would be his entirely; if he took it as security or, what is the same thing practically, as conditional payment, he would hold it for value to the extent of his demand, though no further. Another example: A mortgagee may by this rule take a release of the equity of redemption, for value, without any new consideration, on discharging the mortgage debt, where the sum due is substantially equal to the whole value of the property mortgaged.²

Mass. 578; *Railroad Co. v. National Bank*, 102 U. S. 14, 58, 59; *First National Bank v. McAllister*, 46 Mich. 397; *Dyer v. Rosenthal*, 45 Mich. 588; *Beurmann v. Van Buren*, 44 Mich. 496; *Knox v. McFarren*, 4 Colo. 586; *Turner v. Killian*, 12 Neb. 580; *Gamble v. Harris*, 5 Del. Ch. 512.

See *Louthain v. Miller*, 85 Ind. 161; *Meyer v. Evans*, 66 Iowa, 179; *Smith v. Riggs*, 56 Iowa, 488; *Butterfield v. Okie*, 36 N. J. Eq. 482.

¹ In *re Barker*, 44 L. J. Ch. 487,

Jessel, M. R.; *Blanchard v. Stevens*, 3 Cush. 162, 168; *infra*, p. 461, note.

² *Williams v. Robbins*, 15 Gray, 590. If the estate was actually worth much more than the sum due, the release, if bona fide, would be voluntary only as to the excess. *Rice v. Morner*, 64 Wis. 599; *Hughes v. Shull*, 33 Kans. 127; *Strong v. Lawrence*, 58 Iowa, 55; *Stanley v. Laning*, *ib.* 662; *Phelps v. Curtis*, 80 Ill. 109. But if the release were fraudulent, it would, by the better rule, be entirely void. See

As a question of principle the rule that C is a holder valuable consideration under the statute in all such cases appears to be the preferable one. Where C takes property in discharge of his debt, he takes for his debt something which he was not bound to take, and foregoes his right to insist upon payment according to the undertaking; and where C takes the property in conditional payment or as security, he is either induced to forbear to press the debtor or (what is as an equivalent) is presumably lulled into a feeling of satisfaction and so induced to forego taking measures for his protection which otherwise he might and probably would have taken

chapter 16. See also *Hartman v. Allen*, 9 Lea, 657; *Bennett v. Union Bank*, 5 Humph. 617; *Wallach v. Wylie*, 28 Kans. 33. So too of course where the consideration of the discredited instrument was in point of fact nominal or trivial. *Stevens v. Dillman*, 86 Ill. 233.

Of course where a creditor undertakes to pay the pre-existing obligation of his debtor to a third person, such creditor receiving therefor a security running to his debtor, he is, under any rule, a purchaser of the security for valuable consideration. *Smith v. Spencer*, 73 Ala. 299.

¹ In a recent case the matter has been very clearly put by Jessel, M. R. In re *Barker*, 44 L. J. Ch. 487. The learned judge there says: 'In the case of further security [after the original transaction] the lender gives time and forbearance, or he gives some other advantage to the person giving the further security; and that is valuable consideration. But if, without that, after a voluntary instrument [as security] has been executed, its contents are communicated to the person taking the benefit of it, and, acting upon the faith of it, he does substantially alter his position, that is, he does communicate to the donor his acceptance of the

further security, and by so doing gives value to the donor, being value which the donor expected him to give [forbearance or indulgence], he in fact accepted the voluntary instrument as a consideration for the act he takes upon the faith of it.'

Upon the other view that the creditor is lulled into security see *Blanchard v. Stevens*, 3 Cush. 162, 168, where the court says: 'But may you not show legal consideration by showing forbearance to act as by showing an act done? A damage to the promisee is all that is necessary to show a good [valuable] consideration for a promise; and our rule is not the same rule to apply in the proposition of a note transferred to him? the party had not received the note as collateral security, he might have pursued other remedies to enforce the security or payment of his debt. He might have obtained other securities perhaps payment in money. It is a fallacy to say that if the plaintiffs were defeated in their attempt to enforce payment of these notes, . . . nevertheless they are in as good a situation as they would have been in if the notes had not been transferred to them.' This is probably going to the verge of the law, and is in part put upon

In this latter way of putting the consideration it appears to be assumed that there is no agreement, express or implied, for extending the time of payment of the debt to secure which the property is transferred; if there were such an agreement, there would be a valuable consideration by all the authorities.¹

If, where the New York doctrine prevails, a creditor pay over to his debtor cash, or turn over property, in addition to discharging the pre-existing debt, for property bought from the debtor, the rules governing the transaction will be those touching purchases upon a new consideration. The discharge however of the old debt will, it seems, be a circumstance to be considered in connection with any other evidence received, in ascertaining the character of the transaction. So it has lately been laid down in a series of cases in Alabama, where the New York doctrine in regard to pre-existing debt prevails;² transactions being referred to in which the debtor intends to use the funds, received in payment or exchange from the buying creditor, in fraud of his other creditors, of which fact the buyer has notice.³

As we have already intimated, the transfer may be a valid preference; then of course it will make no difference that the creditor parted with no new consideration; his title will be good against other creditors having no lien.⁴ Nor does it

ground of convenience and safety in dealing with negotiable paper.

¹ For those of New York see *Pratt v. Conan*, 37 N. Y. 440; *Moore v. Ryder*, 65 N. Y. 438, 442; *Burns v. Rowland*, 40 Barb. 369. See also *Oates v. First National Bank*, 100 U. S. 239. Any detriment sustained by the creditor other than that necessarily involved in taking property in payment or as security would everywhere make a valuable consideration. For various examples of the kind under the strict rule of New York see *Bigelow's Bills and Notes*, 498, 499.

² *Carter v. Coleman*, 82 Ala. 177, 182, *Clopton, J.* citing *Levy v. Williams*, 79 Ala. 171. To the same effect, *Owens v. Hobbie*, 82 Ala. 466; *Moog v. Farley*, 79 Ala. 246.

³ The buyer must not put it 'in the power of the debtor to effectually screen a part of the proceeds . . . having knowledge of facts sufficient to create a reasonable belief that such is his intention. No part of the purpose must be ease or favor to the debtor.' *Clopton, J.* in *Levy v. Williams*, *supra*, at p. 179.

⁴ *Murphy v. Briggs*, 89 N. Y. 446; *Hodges v. Coleman*, 76 Ala. 103.

make any difference that the transfer may not proceed directly from the debtor to his creditor. In a recent case¹ it appeared that W conveyed land to M in fraud of W's creditors, M participating. At W's request M now mortgages the land to a creditor of W, without notice, but upon no present consideration. The mortgagee's title was held good, as a valid preference, against other creditors of W. The distinction was laid down that where a transfer is made to a stranger, he must have an equity superior to that of his vendor, in a contest with creditors, and that requires that he should have parted with (new) value and have taken without notice; where however the transfer is to a creditor, there need be no new consideration, as the transaction amounts only to a preference.² But of course if the preference is invalid as such, the creditor cannot hold the property, because he is not a purchaser for value.

It should however be observed of the New York rule that a creditor may also be a purchaser for value, not indeed by taking property to secure what is due to him, and probably not by taking it in payment of the same, for in either case that would only be a preference. But the fact that a man is a creditor will not prevent him from buying property of his debtor as a non-creditor might do.³ That is, a creditor may buy property from his debtor, and if he purchase as from a stranger, for valuable consideration and in good faith, he will be allowed to hold it, regardless of the laws touching preference.

The pre-existing debt or demand may be any lawful claim ;

¹ *Murphy v. Briggs*, supra.

² *Ib.* ; *Seymour v. Wilson*, 19 N. Y. 417, 421. The court in *Murphy v. Briggs* further said : 'The rights of the mortgagees as creditors to have their debts preferred by mortgages on the property of the debtor are equally equitable with the claims of creditors, and no valid ground is apparent why they should be placed behind other creditors, when liens of the latter are

of later date. A bona fide purchaser or mortgagee from a fraudulent grantee, without notice of the fraud, is entitled to a preference over a subsequent purchaser. The mortgagee is a purchaser to the extent of his interest. *Ledyard v. Butler*, 9 Paige, 132.

³ *Redhead v. Pratt*, 72 Iowa, 99. See *Williams v. Robbins*, 15 Gray, 590, which however was in reality a case of preference.

it may be a cause of action for tort. There is a good illustration (though not arising under the statute of Elizabeth) in a recent case.¹ That was a suit to compel the defendant to transfer to the plaintiff certain stock, which a cotrustee of the defendant had made over to him. The plaintiff, defendant, and a man named Carter were trustees of two different funds, which may be designated as the X fund and the Y fund. Carter misappropriates part of the X fund, and then applies part of the Y fund to the purchase of the stock in question, which he transfers into the name of himself (which is not material) and the defendant; the defendant and the plaintiff being unaware of the fraud. Nor had the beneficiaries of the X fund any notice that the stock was purchased with part of the Y fund. It was held that the plaintiff ought not to prevail, on the ground that by accepting the transfer of the stock the defendant put an end to the right of action which he had against Carter to compel him to put back the fund; the act being a wrong to the defendant.²

The New York authorities agree that a creditor who takes a negotiable instrument in payment of a pre-existing debt or demand is a purchaser for value.³ On the other hand they

¹ *Taylor v. Blakelock*, 32 Ch. D. 560, C. A.

² Cotton, L. J. : 'At the time when this transfer was made . . . he [the defendant] had a right to sue his cotrustee for the purpose of getting that money which had got into his hands or into the hands of his firm; either way Carter would have been liable. When he took the transfer of this stock into the name of himself and of Carter, he, by accepting the transfer, lost and put an end to the right of action which he had as against Carter in order to make him bring back this fund. . . . Therefore he gave up, by accepting stock, a valuable right. He gave valuable consideration just as much as if he had

actually parted with money; for he gave up, lost, parted with the right to sue Carter, which up to the time when this stock was transferred he had. In my opinion, independently of any question of pressure, that was valuable consideration.' This has been true at least since the time of *Twyne's Case*, 3 Coke, 80, the difficulty with which was, not that the precedent debt did not furnish a valuable consideration, but that the consideration was not bona fide. And Bowen, L. J. says in *Taylor v. Blakelock*, *supra*, that before the reign of Elizabeth as well as since a pre-existing debt was a valuable consideration.

³ *Seymour v. Wilson*, 19 N. Y. 417; *Weaver v. Barden*, 49 N. Y. 286, 294;

deny that the *mere* taking by a creditor of such an instrument by way of security or of conditional payment, where he does not forego any rights against the debtor, that is, where there is no other present 'consideration' than what may be implied by the mere taking of the paper and the duties consequent thereon, can make the creditor a holder for value.¹ The English authorities more generally, the American authorities hold the contrary. This might stand upon the special ground alone that the subject of transfer is a negotiable instrument;² but it is believed that it may stand on broader ground also, ground sufficient for property in general.

The negotiable paper should however be so transferred to the creditor as to make him a holder in his own right against any rights of the debtor; it would not make the creditor purchaser for value to transfer the paper to him as an agent or a trustee of the debtor.⁴ As we have seen, the transfer is no *purchaser* in such a case, although he may be bound by the contract. It is sometimes said that the paper should be transferred to the creditor as to impose upon him the du-

Bank of Sandusky v. Scoville, 24 Wend. 115.

¹ Comstock v. Hier, 73 N. Y. 269. This is not true of accommodation paper, as such, so taken. Grocers' Bank v. Penfield, 69 N. Y. 502; Maitland v. Citizens' Bank, 40 Md. 540.

² Currie v. Misa, L. R. 10 Ex. 153, Ex. Ch.; s. c. 1 App. Cas. 554; Poirier v. Morris, 2 El. & B. 89; Percival v. Frampton, 2 Crompt. M. & R. 180, Parke, B.; Stevens v. Blanchard, 3 Cush. 162, 169; Culver v. Benedict, 13 Gray, 7; Le Breton v. Peirce, 2 Allen, 8, 14; Fisher v. Fisher, 98 Mass. 303; Bank of Republic v. Carrington, 5 R. I. 515; Reddick v. Jones, 6 Ired. 107; Gibson v. Connor, 3 Kelly, 47; Bigelow's Bills & Notes, 498, 503.

³ Blanchard v. Stevens, 3 Cush. 162, 169. The rule is partly based upon

grounds peculiar to the law of negotiable instruments. 'The convenience and safety of those dealing in negotiable paper seem to require and justify the rule, that when a person takes a negotiable note not overdue, or apparently dishonored, and without notice, actual or constructive, of the want of consideration, or other defence thereto, whether in payment for a precedent debt, or as collateral security for a debt, the holder should have the legal right to enforce the same against the parties thereto notwithstanding such defence might have been effectual as between the original parties.' *Ib.*, Dewey, J.

⁴ Austin v. Curtis, 31 Vt. 64; Homan v. Miller, 1 Am. L. Reg. 676, 68. See Oates v. First National Bank, 10 U. S. 239, 248; Bigelow's Bills & Notes, 500, 504.

of attending to demand and notice of dishonor; but that would not of itself make him a purchaser, for such duty an agent for collection would ordinarily assume.¹

It is to be remembered that the mere fact that one to whom title itself has been made undertakes burdens in regard to the subject of transfer does not make him a purchaser for value.² It would then, in principle make no difference that there was no party to the paper to be notified of dishonor. The very act of taking the security has a natural tendency to lull the creditor into a feeling of safety, and so to induce him to forego taking steps for his protection which otherwise he might and would have been apt to take. *That* is treated as value;³ but it is no doubt pushing the doctrine of valuable consideration to its extreme. As we have seen, the case may perhaps rest upon the need of protecting the circulation of negotiable paper,⁴ and hence not furnish a general doctrine of law. Indeed there might be ground for contending that the rule applies only to questions of the right of the holder against the maker or acceptor of the note or bill, and not to questions of the rights of creditors under the statute of Elizabeth; but it is believed that no such distinction would be taken by the courts now referred to.⁵

§ 7. PAST CONSIDERATIONS: MATTER EX POST FACTO.

The general doctrine of contracts that a promise based upon a past consideration, that is, a subsequent promise to pay for a 'voluntary courtesy' or for past services or things which the promisor was not bound to pay for, is not valuable,—that

¹ *Allen v. Snyder*, 20 Wend. 321, Court of Errors; *Jenkins v. Bacon*, 111 Mass. 373, 377; *Bigelow's Bills and Notes*, 284.

² *Supra*, p. 446.

³ *Blanchard v. Stevens*, 3 Cush. 162.

⁴ *Ib.*, *supra*, p. 465, note.

⁵ The two cases may be put thus: 1. A is induced by false representations to execute his negotiable note to B, who delivers it, without notice, to his creditor C, as security for debt. C will be entitled to recover against A; purchase for value without notice has cut off A's equity. 2. A makes his negotiable note, in fraud of creditors, to B, who transfers it to C, as in the first case. It seems that C's claim will prevail not only against A but against A's creditors.

doctrine in essence applies to conveyances otherwise within the statutes of Elizabeth, as well as to other cases. In other words a case within the statute is not taken out of it by virtue of a transfer based upon past consideration which in itself created no legal demand.

A common example is seen in the case of a postnuptial settlement or conveyance not founded upon any present consideration; such transaction is not valid against the grantor's creditors; the past consideration of the marriage is not valuable. Indeed there is high authority for the position though the postnuptial conveyance was made in pursuance of an antenuptial undertaking in consideration of the marriage still if that undertaking was not in writing, the execution of it after the marriage will be invalid against creditors; because the act was the carrying out of an undertaking which could not have been enforced.¹ But the decisions upon that point are not in harmony, as we have elsewhere seen.² In Virginia all postnuptial settlements are presumptively voluntary.³

¹ *Warden v. Jones*, 2 De G. & J. 76; *Edgerton*, 48 Ark. 419; *Sloan v. Trowell*, 8 Ch. D. 318, C. A.; *Goldicutt v. Townsend*, 28 Beav. 445, 451; *Spurgeon v. Collier*, 1 Eden, 91; *Randall v. Morgan*, 12 Ves. 67; *Borst v. Corey*, 16 Barb. 136; *Deshon v. Wood*, 148 Mass. 132. See ante, pp. 134, 161, note. But see *Dundas v. Dutens*, 2 Cox, 235; s. c. 1 Ves. Jr. 196 (denied in *Warden v. Jones* and *Trowell v. Shenton*, supra); *Barkworth v. Young*, 4 Drew. 1 (denied in *Trowell v. Shenton*); *Hussey v. Castle*, 41 Cal. 239; and cases on the Statute of Frauds cited at end of chapter 5. In *Brunsdon v. Stratton*, Prec. in Ch. 520, a settlement after marriage, made pursuant to antenuptial articles, though not entirely agreeing with them, was sustained against creditors. See also *Chambers v. Sallie*, 29 Ark. 407, where an alleged antenuptial agreement was not proved; *Adams v.*

Marriage cannot be considered part performance of the oral contract so as to take the case out of the Statute of Frauds. *Warden v. Jones*, supra; *Caton v. Caton*, L. R. 1 Ch. 137, 14 affirmed L. R. 2 H. L. 127. But *Hussey v. Castle*, supra.

² Ante, pp. 133, 161.

³ *Hatcher v. Crews*, 78 Va. 46; *Fink v. Denny*, 75 Va. 663; *Blow Maynard*, 2 Leigh, 30. The common mistake however is made in the cases of declaring that the presumption changes the burden of proof. Presumption is simply sufficient evidence, and no more changes the burden of proof than any other kind of evidence. It must be met by evidence as weighty as that is all. Ante, vol. 1, pp. 11, 130.

Another illustration is seen in the case of services rendered either between members of a family living together in the usual way¹ or by those who are bound to render services in return for support and protection or the like. In a Pennsylvania case² it was held that an instruction to the following effect should have been given to the jury: Assuming that J S lived with his father after he was of age, then if no express contract is proved between them that the father should pay J S wages, and there is no evidence of any contract or agreement on that subject between them, the father could not, after having become embarrassed with debt, create a debt to J S for services and convey his property to him in consideration of such debt at the expense of creditors.³

Another example is found in a case⁴ in which a wife, having received money from her father's estate, lets her husband have part of it, some of which he uses in improvements upon land, some in support of the family, and some for purposes of his own; this without any contract or agreement in regard to repayment, payment of interest, or the like. Finally long afterwards, after suit by a creditor of the husband, the husband is induced by the wife's importunities to mortgage the land just mentioned to the wife to secure her in the payment of the money. It was held that this mortgage could not stand against the claim of the creditor.⁵

¹ *Faloon v. McIntyre*, 118 Ill. 292, a strong case.

² *Hack v. Stewart*, 8 Barr, 213.

³ See also *Walker's Estate*, 8 Rawls, 243; *Candor's Appeal*, 5 Watts & S. 513; *Faloon v. McIntyre*, 118 Ill. 292; *Atwood v. Holcomb*, 89 Conn. 270; *Danley v. Rector*, 5 Eng. (Ark.) 211, chapter 6, § 7. Secus where the case simply is that the husband has taken and appropriated the gift. *Patton v. Conn*, 114 Penn. St. 183; ante, p. 156, note.

⁴ *Hanson v. Manley*, 72 Iowa, 48.

⁵ *Reed, J.* 'It has been held by this

court in two cases that when the wife permits the husband to expend her money for the support of the family, she cannot, in the absence of an express agreement for its repayment, recover the amount in an action against him or against his estate. *Patterson v. Hill*, 61 Iowa, 534; *Courtwright v. Courtwright*, 53 Iowa, 57.' And as to the money used for the husband's own purposes, that was to be treated as a gift by the wife. 'Under such circumstances the law will not create the relation of debtor and creditor between

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So of additions to property made by the labor and earnings of a wife; it is held that these cannot be treated as a valuable consideration to support a conveyance by the husband to his wife, against the claims of creditors;¹ and so of conveyances made at common law by a husband to convey property to his wife in 'consideration' of having reduced her personal estate to his possession and use.²

A past consideration however is to be distinguished from what becomes by relation, through matter ex post facto, a valuable consideration; in that way what was at first a voluntary conveyance may, if it can be connected by law with the matter ex post facto, become a conveyance founded upon a valuable consideration. This distinction has been clearly recognized from the time of Sir Edward Coke; indeed the proposition that a voidable deed may be made valid and effectual by matter ex post facto is as old as the statute of Marlbridge passed in the year 1267.³ That however was before the doctrine of valuable consideration had become part of the law. But as far back as the year 1663⁴ this case arose: A conveyance was made

to the parties.' The conveyance therefore was voluntary. See also *Humes v. Scruggs*, 94 U. S. 22; *Fox v. Moyer*, 54 N. Y. 125; *Luers v. Brunjes*, 34 N. J. Eq. 19 and 561; *Cole v. Lee*, 45 N. J. Eq. 779, 785; *Beecher v. Wilson*, 84 Va. 813.

¹ *Triplett v. Graham*, 58 Iowa, 135. But it is held in some states that a 'moral obligation' may, when very strong, constitute a consideration to support a conveyance, against the claims of creditors. *Cottrell v. Smith*, 68 Iowa, 181; ante, chapter 6, § 9.

² *Jaffrey v. McGough*, 83 Ala. 202; *Gilkey v. Pollock*, 82 Ala. 503; *Early v. Owens*, 68 Ala. 171, overruling *Brevard v. Jones*, 50 Ala. 241 (conveyance on 'consideration' of the use and appropriation of rents and profits of the

statutory separate estate of the grantor's wife, which rents and profits the grantor was entitled to by law); *Bolli Jones*, 67 Ala. 508 (same); *Anderson*, 80 Ky. 638 (which falls short of the proposition in the case of *Sloan v. Torrey*, 78 Mo. 623. In

the last case the husband was not allowed to treat his wife as creditor, to sustain a conveyance to her, in respect to the proceeds of land belonging to her, not as her separate estate, which she had used and disposed of with her consent. See *Luers v. Brunjes*, 34 N. J. Eq. 19 and 561; *Bayne v. State*, 62 Md. 100; *Hard v. Tenney*, 87 Ky. 52; and see chapter 6, § 7.

³ 2 Inst. 111.

⁴ There are doubtless earlier cases.

in trust for an only daughter for a term of years, to the intent that the profits before her marriage should be applied to her maintenance, and if she married with her father's consent, then in trust for her during the rest of the term. The deed to the daughter was voluntary, and the court held that it would have been invalid (against a subsequent purchaser for valuable consideration¹) if marriage as contemplated had not intervened; when that took place the deed ceased to be voluntary, and became supported by a valuable consideration.²

The doctrine of relation has been reaffirmed in this country.³ In one case⁴ an embarrassed debtor made a voluntary conveyance of personalty to an unmarried woman; and afterwards, upon her marriage, the property was settled to the use of the wife for life and after her death to her children's use. The court held that the property was not liable for the debts of the (first) grantor; the conveyance became, by the marriage, good by relation as if it had originally been founded upon a valuable consideration.⁵ Nor does it matter whether the conveyance was made with a view to a particular marriage or not; enough that the conveyance became known to others afterwards, and was one probable inducement to the marriage.⁶ Indeed it appears unnecessary to show actual knowledge of it.⁷

¹ The case thus related to the 27th Eliz. c. 4; but the principle would have been the same had it related to the 13th Eliz. c. 5.

² *Prodgers v. Langham*, 1 Sid. 138. See this case stated in *Huston v. Cantvil*, 11 Leigh, 136; and see *Bentley v. Harria*, 2 Gratt. 357; *Kirk v. Clark*, Prec. Ch. 275; s. c. 2 Eq. Cas. Abr. 46, pl. 13; *East India Co. v. Clavell*, Prec. Ch. 380; *Brown v. Carter*, 5 Ves. 877, 888.

³ See the Virginia cases just cited; *Sterry v. Arden*, 1 Johns. Ch. 261; s. c. 12 Johns. 536.

⁴ *Bentley v. Harria*, *supra*.

⁵ See also *Kirk v. Clark*, Prec. Ch. 275; *East India Co. v. Clavell*, ib. 377; *Brown v. Carter*, 5 Ves. 882; *George v. Milbanke*, 9 Ves. 190; *Sterry v. Arden*, 1 Johns. Ch. 261, affirmed 12 Johns. 536.

⁶ Chancellor Kent in *Sterry v. Arden*, 1 Johns. Ch. 261; and see *Huston v. Cantvil*, 11 Leigh, 136, 155; *Brown v. Carter*, 5 Ves. 882.

⁷ *Ib.*; *Brown v. Carter*, *supra*. It has however been held that if the settlement was not made with any view to marriage, it does not become valuable by the subsequent marriage, even though the existence of it was an inducement

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This doctrine proceeds upon the ground that the gift to donee is made upon an executory consideration performed by the marriage; and where the gift is to the wife, there is a consideration 'moving' to the husband which makes him a party to what now becomes a perfectly valid contract.¹ A gift to the (female) donee is a sort of continuing offer which others finally accepted in the marriage. Whether recent legislation in favor of married women, in regard to property rights, may have affected this particular phase of the doctrine of relation is worthy of consideration; but what has been remarked in regard to the ground of the doctrine in such cases as those stated may serve to indicate what is meant by relation making a past voluntary consideration valuable. There should be perhaps something in the transaction which is in the nature of an offer; which offer is afterwards expressly or tacitly accepted by what, had it been part of the original transaction, i. e. the alienation, would have supported the same against creditors of the grantor. And it may be remarked of marriage that it matters not, and no one has mattered, whether the claim made by creditors was against the wife or against the husband, where the settlement was made upon the wife by her father or other third person, the debt is in the transaction; the wife's title as purchaser for value

to the marriage. *Stokes v. Jones*, 18 Ala. 734; *Collins v. Burton*, 5 Jur. 952 (reversed upon another point, 4 De G. & J. 612). But see *Sterry v. Arden*, 1 Johns. Ch. 261, 271. How is the party about to marry to know in all cases whether the settlement was made with a view to marriage? It should be observed that if the one induced to marry by the provision becomes a purchaser for value thereby, the other also becomes such purchaser. In *Collins v. Burton*, *supra*, the converse was true.

¹ Against the person who has made the settlement, and those claiming un-

der him, the case might be treated as an estoppel. The settlor has held e. g. his daughter as having received from him the property in question in reliance upon that a third person marries the daughter. After that the settlor cannot overturn the settlement by subsequent sale or other disposition of the property. *Sterry v. Arden*, *supra* may be taken as an illustration. The common way of putting it is probably the safer, for that brings the case in terms within the requirement of law, of a valuable consideration.

just as good in such a case as where the intended husband has made the conveyance to her in consideration of marriage.¹

It must be observed too that the matter *ex post facto*, in order to make the past consideration valuable, must be capable in law of being connected with the former transaction. It is not enough indeed that there may be an intention by the party to be bound to connect the new transaction with the old; that intention must be manifested and executed according to law. Thus to make a mortgage for securing a past debt, without delivering the same or notifying the mortgagee, will not connect the mortgage with the debt.²

§ 8. EXECUTORY CONSIDERATION.

There is another kind of consideration of common occurrence, a consideration valuable at the outset but executory, *i. e.* requiring payment or other act to be done in futuro. ‘*Facio ut facias*,’ of the books, which may be translated into familiar speech ‘I will if you will,’ makes quite as valuable a

¹ In *Sterry v. Arden*, 1 Johns. Ch. 261, Chancellor Kent, whose decision was unanimously affirmed on appeal, in 12 Johns. 536, said of the wife: ‘The marriage was a valuable consideration, which fixed the interest in the grantee against all the world; she is regarded from that time as a purchaser, and as much so as if she had then paid an adequate pecuniary consideration. It has been a principle of long standing and uniformly recognized, that a deed voluntary or fraudulent in its creation, and voidable by a purchaser, may become good by matter *ex post facto*. It is the constant language of the books and of the courts, that a voluntary deed is made good by a subsequent marriage; and marriage has always been held to be the highest consideration in law. Coke Litt. 9 b.’ See also *Huston v. Cantril*, 11 Leigh, 136, 154; *Bentley*

v. Harris, 2 Gratt. 357. The claim of creditors, as in those cases, is usually against both the husband and wife, where a third person has made the conveyance to the wife; but it might be against the wife alone, as upon the death of the husband.

² *Cracknall v. Janson*, 11 Ch. D. 1; *In re Barker*, 44 L. J. Ch. 487; post, p. 485. These were cases under 27 Eliz., under which a later mortgagee, as purchaser for value, prevailed over the prior mortgagee; the mortgage to the latter, not being delivered or communicated, and not having been agreed upon or asked for, being held voluntary. For like cases under postnuptial settlements see *Warden v. Jones*, 2 De G. & J. 76; *Trowell v. Shenton*, 8 Ch. D. 318. These cases overrule *Dundas v. Dutens*, 2 Cox, 235. See ante, pp. 134, 161.

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consideration as 'do ut des' of property mutually given unless the promise, when it is to pay money, is by a person known to be without means or the ability to provide means. But this gives rise to some difficulty. It is laid down that the doctrine of purchase for value does not apply to purchases of property, at least of land, unless the purchase money has been paid before notice of the rights of the seller's creditors;¹ assuming that negotiable paper given in payment has not passed into the hands of bona fide holders for value. That is to say, it is nothing that there is a binding contract to pay,—a contract founded upon the valuable consideration of the undertaking to pay, supported, it may be, by the ne-

¹ *Mullins v. Guilfoyle*, 2 L. R. Ir. 95. In this case two persons, A and B, were tenants in common in fee, and each at the request of the other (as recited in the deed) conveys his moiety to the plaintiff upon trust for the survivor for life and then for A's children. A was held a purchaser for value of B's moiety in favor of A's children; towards whom it was a case of 'facio ut facias.' The case arose under 27th Eliz.

As to fraudulent executory considerations, e. g. promise to pay with intent not to pay, see chapter 19, § 1, at end.

² *Massie v. Enyart*, 32 Ark. 251; *Blair v. Alston*, 26 Ark. 41; *Leach v. Fowler*, 22 Ark. 143; *Ringgold v. Waggoner*, 14 Ark. 69; *Whelan v. McCreary*, 64 Ala. 319; *Thames v. Rembert*, 63 Ala. 561; *Earnshaw v. Stewart*, 64 Md. 513; *Gregg v. Lee*, 37 La. An. 164. See *Bell v. Devore*, 96 Ill. 217; *Jeffers v. Ancels*, 91 Ill. 487; *Perkins v. Webster*, 2 Cush. 480; *Peebles v. Horton*, 64 N. Car. 374; *Jackson v. Harby*, 65 Texas, 710; *Davidson v. Crittenden*, 55 Ga. 497; *Knowlton v. Hawes*, 10 Neb. 534. See however *Beasley v. Bray*, 98 N. Car. 266.

³ *Hoyt v. Turner*, 84 Ala. 523; *Flor-*

ence Sewing Machine Co. v. Zeigler, Ala. 221; *Doak v. Runyan*, 33 M. 75; *Case v. Sawtelle*, 11 Neb. 51; *Aholt v. Hartwig*, 73 Mo. 485; *Fros Beekman*, 1 Johns. Ch. 288; *Wood Mann*, 1 Sum. 506; *Flagg v. Ma*, 2 Sum. 486; *Youst v. Martin*, Serg. & R. 423. See *Boggs v. Verner*, 6 Watts & S. 469; *Dougherty Cooper*, 77 Mo. 528; *Willoughby Willoughby*, 1 T. R. 763, 767, L. Hardwicke; *Story, Equity*, § 150; *King v. Russell*, 40 Texas, 124; *Crittett v. Phinney*, 33 Minn. 167; *Keyser v. Keyser*, 40 N. J. Eq. 481; *Bush Collins*, 35 Kans. 535; *Colquitt Thomas*, 8 Ga. 258. But see contra *Davidson v. Crittenden*, 55 Ga. 497.

Davidson v. Crittenden proceeds upon the ground that the buyer, having given his notes for the purchase-price, cannot control the same; that is to say, he may be compelled to pay. This is true; but he should now make payment to the creditors, or hold the money for them. See the text, on p. 475. If the notes have passed into the hands of a bona fide holder for value the case will no doubt be different. *Comp. Davidson v. Crittenden*, supra.

check, or bond of the buyer, still in the hands of the debtor; — to pay the *debtor* after notice of creditors' rights would be to pay in one's own wrong.¹ A Missouri case² affords a good illustration. A purchaser of property gives his check for the purchase-price, but with the understanding that it is not to be paid immediately, instructing his banker to withhold payment until further orders. After notice that a creditor of the vendor has attached the property on the ground of fraud, the purchaser directs that his check be paid, and that is done. The purchaser cannot hold the property; except, it should be added, upon the footing of paying the debts or of a surplus out of the property, for the sale may have been good.

All this is probably sound doctrine, whether consistent with some other rules of law or not; for it comes only to this: The buyer may pay at any time if he has not yet received or become fixed with notice of the rights of creditors;³ that is, he is not bound to perfect his title at once by payment.⁴ And to the extent to which he has made payment before notice, he will be protected;⁵ there is no forfeiture of an innocent payment, though partial.⁶ But the buyer must not pay the *seller* after notice; still in principle the sale is good, because it was good when made, founded as it was upon valuable consideration without notice, the present notice not being retroactive.⁷ If then the sale is good, and the buyer

¹ Same cases.

² *Arnholt v. Hartwig*, *supra*.

³ Perhaps a trustee buying the trust property, though for value and without knowledge of the claims of creditors, could not hold it against creditors, supposing the sale to be invalid towards the *cestui que trust*. Comp. *Miller v. Lebanon Lodge*, 88 Ind. 286, where it was held that the trustee took the property clear of creditors. But he had bought the trust property from an intermediate purchaser. A trustee, it seems, would always have notice of debts, whether he had knowledge or not.

⁴ Comp. with this what is said about assignees.

⁵ *Florence Sewing Machine Co. v. Zeigler*, 58 Ala. 221.

⁶ *Ib.*

⁷ *Ante*, p. 4, note 2. There might perhaps be cases in which the buyer would have to surrender the property to the creditors, upon indemnification by them for payments and improvements made. *Florence Sewing Machine Co. v. Zeigler*, *supra*, *Stone, J.* But such cases would be peculiar.

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cannot safely pay the seller, it is because he ought not pay the money due over to the seller's creditors. That is the view of the authorities;¹ and it is clearly right.²

But is this only a particular instance of a general rule? Is there a rule that, after notice, performance of that which was undertaken as the consideration of an alienation of property made or to be made would be in the party's own wrong? It is to be observed that there are cases where the performance of the executory consideration could not be transferred to the debtor's creditors; it might be e. g. marriage. In such a case would the fact that performance took place after notice, cut off the right to receive what was agreed upon in a perfectly binding contract? It clearly could not be said that marriage was in one's own wrong after notice of creditors' rights touching the property of the spouse who had agreed to convey on consideration of marriage.³

On the whole it may be doubted whether there is any such broad rule as that suggested. The case of marriage, at least in some ordinary phases, would seem to be against it. It certainly could not be alleged in defence of a suit for breach of contract of marriage that the defendant's creditors had forbidden it, or that they would claim the property which was to be transferred under the antenuptial contract and the

¹ *Florence Sewing Machine Co. v. Zeigler*, 58 Ala. 221. *Harvey v. Varney*, 98 Mass. 1; *Dyer v. Homer*, 22 Pick. 253; *Harris v. Harris*, 23 Gratt. 737; *Davey v. Kelley*, 66 Wis. 452; vol. 1, p. 1.

Even if the sale was in the outset voidable by creditors, they could of course validate it by consent, as by having the purchase notes given to a trustee to collect the same for their benefit. *Perkins v. Webster*, 2 Cush. 480, 484. But would that rule apply to a case in which the buyer alleged and offered to show that the seller's creditors were asserting their claims to the property sold or to the unpaid purchase-money? In principle clearly it would not.

² There is this difficulty however, that the rule appears at first to be inconsistent with another rule, to wit, that it is no defence to an action by the seller for the price that the sale was made in fraud of the seller's creditors. *Sterry v. Arden*, 1 Johns. 261; s. c. 12 Johns. 536.

disappoint others than the plaintiff (who of course could forego the claim to any part of it), in a case in which others, as e. g. remaindermen, were interested.

The situation might perhaps be different where creditors had already obtained a footing of right to the property, as distinguished from a mere equity.¹ A recent case² in Missouri furnishes by inference, so far as it is sound, an illustration. A father makes a voluntary conveyance of property of considerable value, to his daughter. Afterwards B marries the daughter, having had the deed in his possession during the engagement to marry. He did not know that suit had been brought by a creditor of the father (who was embarrassed at the time) to set aside the conveyance until a few days before the marriage, though a statutory *lis pendens* some weeks before had been filed. It was contended for the defendants, the marriage having taken place, that the conveyance was made good *ex post facto* by the marriage; but while the court conceded that a subsequent marriage with the grantee of a voluntary conveyance, when the marriage was in contemplation of the conveyance, would validate the deed against the grantor's creditors,³ it was held that that was not true of a case like this, in which the creditor had obtained judgment and had had the property in question sold and due notice of suit given before the marriage. If the husband was a purchaser for value, he was such after the creditor's rights had attached.⁴

§ 9. ILLEGAL CONSIDERATION.

Again the consideration should be one which the law does not pronounce illegal. Thus a conveyance will not be sup-

¹ It should always be remembered that a mere equity is something short of a property right, short i. e. of a right in rem.

² *Lionberger v. Baker*, 88 Mo. 447.

³ 2 *Sugden, Vendors*, 467, *Perkins*; *Wood v. Jackson*, 8 *Wend.* 33.

⁴ The case of a conveyance between the parties to the marriage would be a different thing in form, but perhaps not different in regard to the case here stated. *Quære*.

ported against the claims of creditors, that is, where it interferes with the collection of their claims, when based upon illicit intercourse, to which the woman has consented,¹ unless it was effected under promise of marriage. If the woman did not consent, or if she was below the age of consent, or if she was seduced under promise of marriage, or, perhaps, if there was a very strong moral obligation to make pecuniary amends, as where the father desires to refund to the mother of his illegitimate children monies expended by her in bringing them up and educating them,²—in such cases the consideration of the payment, conveyance, or settlement, in whole or in part of the damages justly due her, will be lawful; and the conveyance will be upheld against the man's creditors.³ The same may be said of cases falling within the exceptions to the rule that there can be no contribution between wrongdoers.

§ 10. MARRIAGE: DOWER AND THE LIKE.

It is everywhere held that an *antenuptial* conveyance or settlement,⁴ in consideration of marriage and bona fide, is valid against creditors.⁵ And it can make no difference

¹ Jackson v. Miner, 101 Ill. 550; Potter v. Gracie, 58 Ala. 303; ante, p. 160, note.

² Wait v. Day, 4 Denio, 439; Fellows v. Emperor, 13 Barb. 97. But see Potter v. Gracie, 58 Ala. 303. See ante, p. 160.

³ Ib; Hunsinger v. Hofer, 110 Ind. 390; Bishop v. Redmond, 83 Ind. 157.

⁴ As to postnuptial conveyances see ante, § 7.

⁵ Champion v. Cotton, 17 Ves. 263; Ex parte McBurnie, 1 De G. M. & G. 441; Kevan v. Crawford, 6 Ch. D. 29, C. A.; Bulmer v. Hunter, L. R. 8 Eq. 46; Herring v. Wickham, 29 Gratt. 628; Clay v. Walter, 79 Va. 92; Ar-

nold v. Estes, 92 N. Car. 162; Marshall v. Morris, 16 Ga. 368; Harper v. Scott, 12 Ga. 125; Otis v. Spencer, 102 Ill. 622; Sterry v. Arden, 1 Johns. Ch. 261; s. c. 12 Johns. 536. Further see Coke, Litt. 9 b; McGowan v. Hitt, 16 S. Car. 602; chapter 5, at end. After a marriage contract has been made, can an undertaking of either party to make a conveyance, 'in consideration' of the intended marriage, be deemed to be founded upon valuable consideration when it is not in furtherance of anything agreed upon in the engagement for marriage? But perhaps some latitude would be allowed in such cases, upon the ground that such matters are not usually considered very much, and

whether the conveyance is made to the intended wife or to the intended husband; nor can it make any difference whether it was made by one of the parties to be married or by a third person.¹ It does not matter even that there is a false recital of the consideration on the face of the deed; that cannot give cause for a forfeiture of what the grantee was entitled to receive.² Bankruptcy statutes in England have in some slight particulars modified the rule of marriage as a valuable consideration.³

are not settled, at the time of making the engagement.

Re-celebration of a marriage cannot be taken into account upon a question whether a conveyance is founded upon valuable consideration, as where a conveyance is made between a marriage upon elopement and a subsequent solemnization of marriage. *Ex parte Hall*, 1 Ves. & B. 112; *Dobbyn v. Adams*, 7 Ir. Ch. 193; *Adams v. Adams*, 8 Ir. Ch. 41.

¹ *Arnold v. Estis*, supra, father to daughter and intended husband; *Clarke v. Wright*, 6 Hurl. & N. 849, 872, Cockburn, C. J.

² *Campion v. Cotton and Kevan v. Crawford*, supra. Fraud on creditors however, in which the intended wife is implicated, would avoid the transaction. *Bulmer v. Hunter*, supra.

The agreement of the parties to having a marriage settlement annulled affords a valuable consideration for the husband to convey back to his wife property which he received under the same. *Harper v. Scott*, 12 Ga. 125.

³ The English Bankruptcy Act, 1883, section 47, (1) provides that any settlement of property, not being a settlement made before and in consideration of marriage, or made in favor of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or

children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof. (2) Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not, at the date of the marriage, any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy. (3) 'Settlement' includes any conveyance or transfer of property.

§ 10.] THE SAVING: VALUABLE CONSIDERATION.

There has been much discussion in the courts of England upon the question, as it is usual to put it, who are within consideration of the marriage. There never has been doubt that the person to be married and her or his issue within it, i. e. were purchasers for valuable consideration; the difficulty has been in regard to relatives ('collaterals' they are called) other than such issue, children and grandchildren² for whom provision may have been made, — are the 'collaterals,' purchasers for value? A case³ of the kind touching the statute of 27th Elizabeth, went to the Exchequer Chamber in the year 1861, where different views were adopted. It was held, one judge dissenting, that the plaintiff illegitimate son of the settlor, for whom provision had been made, was a purchaser for value.

Mr. Justice Blackburn so held on the ground that the element in the particular case was a contract in which dispositions made interfered with the rights which otherwise would have arisen and that it was to be taken therefore as a *bargain* of both sides that the plaintiff should have benefit of the provision.⁴ Lord Cockburn and Mr. Justice Wightman considered that the plaintiff's case came within the exception to the rule that 'collaterals' were not within

¹ The difference between the consideration of marriage, where issue are to have benefits, and consideration in other contracts, should be noticed. 'In a contract between A and B if A does not make it good on the one hand, B is not bound on the other. But not so in the case of marriage; for if the mutual issue are purchasers, though it is not made good by one of the parties the issue have the right to say, you shall each of you do what you can do, and we must not be disappointed.' Lord Eldon in *Randliffe v. Parkyns*, 6 Dow, 149, 209.

² *Saunders v. Dehew*, 2 Vern. 271.

³ *Clarke v. Wright*, 6 Hurl. & N.

849, affirming s. c. as *Dickenson v. Wright*, 5 Hurl. & N. 401. All cases are here reviewed.

⁴ So Lord Eldon had put the case in *Pulvertoft v. Pulvertoft*, 18 Ves. 147; and so Lord Redesdale had held in *O'Connell v. Comyn*, 2 Schoales & L. 147; and so Sir Wm. Grant in *Nelson v. Prowse*, 6 Ves. 752. In the named case the learned Master of Rolls says that there were doubts (1802) whether the consideration of marriage extended to objects unconnected with the marriage; but he dispelled the doubts by saying that consideration runs through the whole settlement.'

consideration of marriage, which they assumed to have become established law,—that exception being in favor of the children of a former marriage of the settlor.¹ This view was afterwards adopted by Mr. (now Lord) Justice Fry;² but later still, in the House of Lords Lord Selborne pronounced in favor of the view of Mr. Justice Blackburn, making the question to turn upon the inquiry whether there had been a mutual contracting in favor of the collaterals.³ That is now probably to be taken as the settled doctrine in England;⁴ if so, there appears to be little left of the supposed rule which would exclude the collateral relatives, for in ordinary cases it must be probable that they are within 'the considerations of the mutual contract.'⁵

It was admitted by Chief Justice Cockburn that where a father, tenant for life, joins with his son, tenant in tail, in a settlement on the occasion of the son's marriage, the father may require provision for collateral relatives. In such a case the father's co-operation being necessary to a resettlement of the estate, he might stipulate for such terms as he pleased as the price of his concurrence.⁶ The same would be true, a

¹ There was another exception also, in favor of the issue of the settlor by a future marriage, in default of issue by the one about to take place. *Clayton v. Wilton*, 6 Maule & S. 67, note.

² *Gale v. Gale*, 6 Ch. D. 144.

³ *Mackie v. Herbertson*, 9 App. Cas. 337. Selborne, L. C. : 'The considerations of the contract, though founded on marriage, must, I apprehend, extend to all those terms of the contract on which depend the interests of the persons who are within the consideration of marriage; and when they take, only on terms which admit to a participation with them others who would not otherwise be within the consideration, then, not the matrimonial consideration properly so called, but the considerations of

the mutual contract, extend to and comprehend them.' See also *Doe d. Baverstock v. Rolfe*, 8 Ad. & E. 650.

⁴ May, *Fraudulent Conveyances*, 352, 2d ed. So in Ireland. *O'Gorman v. Conyn*, 2 Schoales & L. 137, 147.

⁵ *Doe d. Baverstock v. Rolfe*, *supra*, would be a case for excluding a collateral. There the limitation was shown, by facts on the face of the conveyance and of other conveyances forming part of the transaction, not to have been made, for the benefit or at the wish of the party in question; and his concurrence did not appear to have been a part of the contract.

⁶ *Clarke v. Wright*, *supra*. That was a case put by Lord Eldon in *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

§ 10.] THE SAVING: VALUABLE CONSIDERATION.

fortiori, where the father makes the provision out of property belonging entirely to him.¹ Lord Teynham seised in fee consideration of a marriage between his eldest son and a marriage portion of £5,000 to be paid, which afterwards was paid, made a settlement on said son and the husband of his body in the marriage, remainder to the settlor's second son in tail, remainder to his own right heirs; and upon subsequent sale of the estate for value by the settlor and death, the question was, whether the second son was a purchaser for value. It was held that he was.³

A wife's inchoate right of dower and the like interests, real or personal, arising from marriage,² should also be mentioned; these will constitute a valuable consideration for a reasonable conveyance of property by the husband, or from funds furnished by the husband, to the wife.⁴ In a recent case⁵ it appeared that land had been conveyed by a third person to a debtor's wife, the defendant in a suit by a creditor to recover the land. The wife paid for the land, but she received the money from her husband shortly before. The husband in previous years had made a number of conveyances of land out of a tract called the 'Hanson farm,' in which the wife had refused to join by way of releasing dower, except upon (verbal) promise by the husband to pay her a certain sum of money. The money in question was the money thus promised.

¹ O'Gorman v. Comyn, 2 Schoales & v. Latham, 46 Ark. 542; Farwell L. 137, 147; Teynham v. Mullins, 1 Johnston, 34 Mich. 342; Sedgwick Mod. 119. The purchaser had notice. Tucker, 90 Ind. 271; Brown v. Railings, 72 Ind. 505; Singree v. Wells, 32 Ohio St. 320; Patrick v. Patrick, Ill. 555; Payne v. Miller, 103 Ill. 44.

² Teynham v. Mullins, *supra*.

³ See chapter 6, §§ 3, 7.

⁴ Bullard v. Briggs, 7 Pick. 533; Holmes v. Winchester, 133 Mass. 140; Nims v. Bigelow, 45 N. H. 343; Rundlett v. Ladd, 59 N. H. 15; Gordon v. Tweedy, 71 Ala. 202; Sykes v. Chadwick, 18 Wall. 141; Bank of United States v. Lee, 13 Peters, 107; Hershey

⁵ Rundlett v. Ladd, *supra*.

The creditor desired an instruction that a verbal agreement between husband and wife, by which the husband undertook to pay the wife, at some future time, for releasing her dower, was of no legal validity, and that the husband had no lawful right, against creditors, to pay any money to the wife in performance of such an undertaking. But the court refused the request; and this refusal was sustained by the Supreme Court.¹

Undertakings of that sort however may easily be made a cover for fraud, and should accordingly be narrowly scrutinized, especially if the husband was embarrassed.² And even though free from meditated wrongdoing, they should be allowed, against the claims of creditors, only in so far as they are reasonable; the transfer by the husband should not be permitted to stand if the value of the dower right would make a very inadequate consideration for the property or money given in return for the release.³

§ 11. CONNECTED TRANSACTIONS.

Again instruments executed at the *same* time though not containing references to each other may be parts of one transaction, and may be so treated, and thus given the support of a common consideration, when otherwise one of them would be voluntary.⁴ A, being indebted, but not insolvent, applied to

¹ So in *Brown v. Rawlings*, supra. In *Rundlett v. Ladd*, Foster, J. said: 'The dower right in the Hanson farm, which the defendant released, belonged not to her husband but to her. It could not be conveyed by him nor taken by his creditors on execution. . . . It does not appear that she received more than the value of it. . . . If she had not signed the deeds, the sum she received would not have been paid. . . . If the farm had not been sold, and his creditors had levied execution on it,

his interest in it would have been appraised and set off in payment of his debts, not at the value of the farm but at the value of the farm subject to her right of dower.'

² *Gordon v. Tweedy*, supra; *Patrick v. Patrick*, supra; *Burwell v. Lumsden*, 24 Gratt. 443.

³ *Gordon v. Tweedy*, supra; *Patrick v. Patrick*, supra.

⁴ *Thompson v. Webster*, 7 Jur. N. S. 531; *Harman v. Richards*, 10 Hare, 81.

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his mother for a loan. She consented upon the terms of her son's making a settlement of certain property, to which she was entitled, upon himself for life and after his death upon his children. A mortgage was executed to secure the loan, and at the same time a settlement of the property referred to was also executed; but neither deed referred to the loan. A became insolvent and died; and his assignee in bankruptcy now sued to have the settlement set aside. But the House of Lords decided that it was valid under the statute of Elizabeth.¹

Where, on the other hand, a number of transfers are made at the same time constituting in all the entire property of a debtor, it matters not, it seems, that a valuable and adequate consideration may have been received by the debtor for some of the gifts; if still the general effect is to delay creditors, the transaction may be annulled by them.² In a recent case³ children procured their father, who was weak in mind and body, to distribute among them the whole of his property, partly in consideration of annuities for his life, partly by voluntary settlement, and partly by pecuniary gifts; the children knowing that the effect of the distribution would be to defeat creditors. The transaction was held void within the meaning of the statute.

Another case⁴ turning upon the same principle was to the same effect: A trader who had become insolvent agreed to sell his business in consideration of a sum of money and an annuity for the joint lives of himself and his wife equal to a quarter of the profits of the business, with a smaller contingent annuity of the same kind to the wife in case she survived. The wife did survive the husband, and creditors now sought to have the transaction set aside so far as this latter annuity was concerned.

¹ *Thompson v. Webster*, *supra*, affirmed, 5 Jur. N. S. 921 and 668. as to the principle of connected transactions.

² *Cornish v. Clark*, L. R. 1 Eq. 184;

³ *Cornish v. Clark*, *supra*.

Switz v. Bruce, 16 Neb. 463. See

⁴ *French v. French*, 6 De G. M. & G. 95.

Nickerson v. English, 142 Mass. 267, G. 95.

concerned, as being voluntary, and therefore in fraud of their rights; and they succeeded, the rest of the transaction being left undisturbed. The object of the debtor plainly was to obtain the benefit of the entire property for his own use.¹

Where the several transactions occur at substantially *different* times, then to connect them there should be some reference, express or of clear implication, from the one to the other or others, or the case should be one in which parol evidence may be proper for the purpose; and the intention to connect the transactions should, as has elsewhere been observed,² be manifested according to the requirements of the law. It will not, it seems, be enough to connect two transactions separated by a long interval of time, that the later one accomplishes some of the purposes contemplated by the earlier, but in other respects varies materially from it. In a recent case³ under the statute of 27th Elizabeth it appeared that a young man, under age and engaged to marry, had promised in writing to make a certain settlement upon his intended wife, on their marriage, which was to take place and took place shortly after his majority. The marriage occurred in 1859. In 1872 a settlement was made upon the wife differing in terms from what had been promised, and, though containing property referred to in the promise, containing other property also. There was no reference to the antenuptial promise. It was held that the settlement could not be referred to the promise, so as to make it a ratification of the same after majority; and the settlement was held fraudulent against a subsequent purchaser.

Indeed in cases of previous *oral* promises, invalid under the Statute of Frauds, it would not be enough, it seems, by the weight of authority, that a later writing and conveyance ex-

¹ *Neale v. Day*, 28 L. J. Ch. 45, a case of the same kind.

² *Trowell v. Shenton*, 8 Ch. D. 318, C. A.

³ *Ante*, p. 133.

§ 12.] THE SAVING: VALUABLE CONSIDERATION.

pressly referred to and performed the promise; for the promise still is not in writing. The authorities however, which we have elsewhere seen, are not in entire harmony upon the subject.¹ Whether the past transaction was founded upon valuable consideration or not makes no difference in the case; if it is necessary for the present purpose that the transaction should be connected with the earlier, the connection must be made according to law. Thus if the act consist in the making of some instrument, as e. g. a mortgage, that instrument must be delivered to the person benefited, or to some one for him, or its existence must be duly communicated to such person; unless indeed there be at first an agreement or undertaking, or a subsequent request ('pressure') for the execution of it.²

§ 12. LIEN CREDITORS.

We have seen³ that lien creditors, in the ordinary sense of the term, have been considered not within the meaning of the substantive part of the statutes against fraudulent conveyances; that is, that they do not fall within the designation of 'creditors and others.' On the other hand they are within the *saving* of the statutes; so far as may be necessary for the protection of their valid claims, they are purchasers for value. This has already been seen incidentally as regards mortgagees;⁴ but it is equally true of all other similar creditors whose liens were prior to the conveyance. It is not the case of creditors by subsequent liens, such as mere attaching judgment creditors, or judgment creditors after return of property found'; such are not purchasers for valuable consideration.

¹ Ante, pp. 133-135.

² Cracknall v. Janson, 11 Ch. D. 1; In re Barker, 44 L. J. Ch. 487; ante, p. 461. The execution of the instrument would be invalid both for want of delivery or communication and for want of valuable consideration. In regard to the

latter point see both the cases just cited and especially what is said by Jessel M. R. in the second case, quoted ante, p. 461.

³ Chapter 6, § 11.

⁴ Ante, § 5; Clapp v. Leather, 18 Pick. 131; Adams v. Edgerton, Ark. 419.

sideration;¹ they are only within the substantive part of the statutes.²

¹ *Devoe v. Brandt*, 58 N. Y. 462; *Ex parte Howe*, 1 Paige, 125; *Schweizer v. Tracy*, 76 Ill. 345, 351; *Gibson v. Warden*, 14 Wall. 249; *Tousley v. Tousley*, 5 Ohio St. 78; *First National Bank v. Hughes*, 10 Mo. App. 7, 16; *Nathan v. Giles*, 5 Taunt. 558; *Beavan v. Oxford*, 5 De G. M. & G. 507; *Dolphin v. Aylward*, L. R. 4 H. L. 486; *Pickering v. Ilfracombe Ry. Co.* L. R. 2 C. P. 235, 248, 251. Lord Cranworth in *Beavan v. Oxford*: 'Independently of any authority I confess I should have thought the proposition hardly arguable that a person who recovers a judgment is a purchaser. A purchaser, in the sense in which the word is used in the statute [he is speaking of 27 Eliz., but there appears to be

nothing peculiar in the statute in that respect], is one who gives money or other valuable consideration in order to have the land. The person who recovers a judgment may indeed eventually get the land, because . . . he may take the land in execution, and therefore he is said to have . . . a lien on the land, but it is not by any purchase.' Some early dicta were denied. The Irish authorities agree with the foregoing. *Abbott v. Stratton*, 3 Jones & L. 603; *Evans v. Evans*, 2 Ir. Ch. 242; *Dunster v. Glengall*, 3 Ir. Ch. 47. See also vol. 1, pp. 406, 407.

² Can there be a case in which one is at the same time, and by the same right, within both the substantive and the saving parts?

CHAPTER XIX.

THE SAVING CONTINUED: GOOD FAITH.

§ 1. NOTICE: KNOWLEDGE: PARTICIPATION.

It is not enough that the purchaser has paid a valuable consideration; he must also have purchased in good faith, or in the language of the statute of Elizabeth 'upon good consideration *and* bona fide.'¹ Though as a mere question of the order of proof, it is enough in some states, as in New York, for the purchaser to show that he has paid a valuable consideration for the property;² that will save him, until it is made to appear that his purchase was not in good faith. This is not the place however to consider such questions.³

¹ Among the many cases which affirm the language or effect of the statute see *Lukins v. Aird*, 6 Wall. 78; *Wadsworth v. Williams*, 100 Mass. 126; *Second National Bank v. O'Rourke*, 40 N. J. Eq. 92; *Miller v. Sauerbier*, 30 N. J. Eq. 71; *Holt v. Creamer*, 34 N. J. Eq. 181; *Billings v. Russell*, 101 N. Y. 232; *Sibley v. Tie*, 88 Ill. 287; *Seesel v. Ewan*, 35 Ark. 127; *Pulliam v. Newberry*, 41 Ala. 168; *Buck v. Voreis*, 89 Ind. 116; *First National Bank v. Carter*, ib. 317; *Powell v. Stickney*, 88 Ind. 310; *Bishop v. Redmond*, 83 Ind. 157; *Sweet v. Wright*, 57 Iowa, 510; *Darland v. Rosecrans*, 56 Iowa, 122; *Flagg v. Pierce*, 58 N. H. 348; *Buckingham v. Wesson*, 54 Miss. 526; *Craig v. Zimmermaer*, 87 Mo. 475; *Weil v. Lapeyre*, 38 La. An. 303; *Mechanics' Ins. Co. v. Gerson*, ib. 310;

Davidson v. Crittenden, 55 Ga. 497; *Swinford v. Rogers*, 23 Cal. 233; *Leinkauff v. Frenkle*, 80 Ala. 136; *Tryon v. Flournoy*, ib. 321; *Shealy v. Edwards*, 78 Ala. 176; *Knowlton v. Hawes*, 10 Neb. 534; *Allison v. Hagan*, 12 Nev. 38; *Eigenbrun v. Smith*, 98 N. Car. 207; *Blum v. Simpson*, 71 Texas, 628; s. c. 66 Texas, 84; *Holmes v. Harshberger*, 31 W. Va. 516, 519; *Bulmer v. Hunter*, L. R. 8 Eq. 46.

The notice may be by an agent. *Clark v. Fuller*, 39 Conn. 238.

² *Starin v. Kelly*, 88 N. Y. 418. *Contra*, *Letson v. Reed*, 45 Mich. 27; *Berry v. Whitney*, 40 Mich. 65; *First National Bank v. Carter*, 89 Ind. 317. See *Orwig v. Merrill*, 69 Iowa, 733; *Stephens v. Oppenheimer*, 45 Ark. 492; *Smith v. Schmitz*, 10 Neb. 600.

³ Vol. 1, pp. 130-134. Proof of

'Good faith' and the like expressions refer to the time of the sale, or to the time of payment if that was subsequent; the purchaser is not affected by facts coming to his attention after payment. The contrary is true of such facts before payment; he must not now make payment to the debtor, on pain of having to pay the same amount to the creditors, unless indeed he has given his negotiable paper for the price, and that has passed into the hands of a bona fide holder for value, and then back to the debtor. But one who has taken *property* in bad faith cannot become a purchaser in good faith by selling and afterwards buying from a bona fide purchaser for value.¹

What fixes upon a purchaser want of good faith, for the purposes of the statutes against fraudulent conveyances, is not in all particulars agreed. According to general doctrines of the law, one who purchases with notice, i. e. with knowledge of facts which would put a prudent man upon inquiry leading to the truth, and a fortiori one who purchases with knowledge of a fact in itself showing a defect or taint in the title or in the sale, purchases without good faith. This is in accordance with the very language of the statute of 13th Elizabeth;² and it is believed to be the better and the more general view of the meaning of the term 'good faith' or 'bona fide' in the statutes generally against fraudulent conveyances.³ The court

fraud on the part of the debtor is enough to require the purchaser to come forward and show that he is within the saving of the statute. *Ib.*; *Letson v. Reed and Starin v. Kelly*, *supra*. *Comp. Butler v. Hogadone*, 45 Mich. 390. But see *New York Fire Ins. Co. v. Tooker*, 35 N. J. Eq. 408. Some courts hold that where the buyer is a near relative of the seller, he must make a stronger case of purchase for value than is required in other cases. *Pollak v. Searcy*, 84 Ala. 259; *Wedgeworth v. Wedgeworth*, *ib.* 274; *ante*, pp. 186-193.

¹ *Johnson v. Gibson*, 116 Ill. 294; *Clark v. McNeal*, 114 N. Y. 287; *Ash-*

ton's Appeal, 73 Penn. St. 153; *Troy Bank v. Wilcox*, 24 Wis. 671; 2 *Pomeroy's Equity*, § 754; *Allison v. Hagan*, 12 Nev. 38.

² *Ante*, p. 33.

³ *Bush v. Roberts*, 111 N. Y. 278; *Starin v. Kelly*, 88 N. Y. 418; *Dean v. Connelly*, 6 Barr, 239; *Wilson v. Howser*, 12 Penn. St. 109; *Batchelder v. White*, 80 Va. 103; *Richardson v. Codding*, 49 Mich. 1; *Letson v. Reed*, 45 Mich. 27; *Berry v. Whitney*, 40 Mich. 65, 71; *Hough v. Dickinson*, 58 Mich. 89 (notice enough, an express and important decision); *Bedford v. Penny*, *ib.* 424 (also directly to the

of Massachusetts however has always treated the present transaction as standing upon a footing of its own, and refused to treat a purchaser as brought within the terms of the law on the mere reason of notice or even of knowledge on his part, if he was without the fraudulent intent of the vendor; creditors will not be authorized to upset the purchase, if that was for value, and the purchaser actually participated in the fraud. For, it is said, he may well have known the vendor's purpose without having participated in it.¹

point); *Eureka Iron Works v. Bresnahan*, 66 Mich. 489; *Finn v. Edwards*, 75 Ala. 411 (knowledge treated as participation); *Sanders v. Muegge*, 91 Ind. 214 (notice enough); *Biddinger v. Wiland*, 67 Md. 359; *Hooser v. Hunt*, 65 Wis. 71 (same); *Lyons v. Hamilton*, 69 Iowa, 47 (same); *Spaulding v. Adams*, 63 Iowa, 437 (same); *Williamson v. Wachenheim*, 58 Iowa, 277 (same); *Jones v. Hetherington*, 45 Iowa, 681 (same); *Keyser v. Keyser*, 40 N. J. Eq. 481 (same?); *Bush v. Collins*, 35 Kans. 585 (same); *Gollober v. Martin*, 33 Kans. 252 (same); *Chandler v. Bailey*, 89 Mo. 641 (same); *Frederick v. Allgaier*, 88 Mo. 598 (knowledge); *McVeagh v. Baxter*, 82 Mo. 518 (knowledge, an important case); *Dougherty v. Cooper*, 77 Mo. 528 (knowledge held enough); *Rupe v. Alkire*, ib. 641 (notice); *De Witt v. Van Sickle*, 29 N. J. Eq. 209 (closing one's eyes to the facts); *Thompson v. Furr*, 57 Miss. 478; *New York Fire Ins. Co. v. Tooker*, 35 N. J. Eq. 408 (notice); *Florence Sewing Machine Co. v. Zeigler*, 58 Ala. 221 (same); *Lehman v. Kelly*, 68 Ala. 192 (same); *Stix v. Keith*, 85 Ala. 465 (same); *Hodges v. Coleman*, 76 Ala. 103 (same); *Mathison v. Prescott*, 86 Ill. 493 (same); *Mulholland v. McLane*, 64 Md. 455; *Clark v. Fuller*, 39 Conn. 238 (same; notice through agent); *Bull v. Ford*, 66 Cal. 176 (same); *Temple v. Smith*,

13 Neb. 513; *Greenwell v. Nas*, Nev. 286; *Wilcoxon v. Morgan*, Colo. 473 (same); *Phillips v. Adams*, Ga. 371 (same); *Smith v. Wellborn*, Ga. 799 (same); *Davidson v. Criden*, 55 Ga. 497 (same); *Massie v. Yart*, 32 Ark. 251 (same); *Galbreath v. Cook*, 30 Ark. 417 (same); *Ringgold v. Waggoner*, 14 Ark. 69 (same); *Isaac v. Fowler*, 7 Eng. (Ark.) 218 (same; judicial sale). *Comp. Hershey v.atham*, 46 Ark. 542; *Traylor v. Tsend*, 61 Texas, 144.

See also *Quinebaug Bank v. Brewster*, 30 Conn. 559; *Goodwin v. American Bank*, 48 Conn. 550; *Pease v. Brewster*, 49 Conn. 58 (insufficiency of all notice); *Neal v. Gregory*, 19 Fla. 3; *Treadwell v. McEwen*, 123 Ill. 3; *Carnahan v. McCord*, 116 Ind. 3; *Pash v. Weston*, 52 Iowa, 675; *Drew v. Anderson*, 49 Iowa, 637; *Ladd v. Newell*, 34 Minn. 107; *Hurley v. Feltor*, 78 Mo. 238; *Sloan v. Torrey*, 623; *Stone v. Spencer*, 77 Mo. 3. Mere want of caution is not equivalent to notice. *Rupe v. Alkire*, 77 Mo. 641. 'Notice from a friend or relation of adverse claimant may be sufficient, while vague reports of mere strangers have been adjudged not enough to charge the conscience of a purchaser.' *Hodges v. Coleman*, 76 Ala. 103, where the matter is considered at length.

¹ *Hill v. Ahern*, 135 Mass. 1

Cases of preference, as we have elsewhere seen,¹ stand upon a special footing; neither notice nor knowledge of a purpose on the part of the debtor to defeat other creditors will, apart from special statutes, affect the creditor's right to hold the

Bristol Sav. Bank v. Keavy, 128 Mass. 298; *Foster v. Hall*, 12 Pick. 99; *Clapp v. Leatherbee*, 18 Pick. 131; *Ricker v. Ham*, 14 Mass. 137; *Troustine v. Lask*, 4 Baxter, 162; vol. 1, p. 132. See *Sharpe v. Williams*, 76 N. Car. 87, *Rodman, J. Carroll v. Hayward*, 124 Mass. 120, however implies that knowledge would be enough. But see *Ricker v. Ham*, at p. 141; *Hill v. Ahern*, at p. 159. There is no analogy between such cases and actions for deceit, though there is analogy between the intent of the *debtor* to defraud his creditors and the intent of the defendant in deceit that his representation should be acted upon. See chapter 15. The court in *Carroll v. Haywood* may have been misled by bankruptcy cases, which were frequently before the courts at that time and often raised questions of 'reasonable ground to believe.' Still knowledge of the debtor's fraud should be enough; and so should notice, in ordinary cases, — as to which see the distinctions taken in chapter 15.

It should indeed be observed that *Ricker v. Ham* and *Clapp v. Leatherbee* which have been taken as authority in later cases (see *Hill v. Ahern*, *supra*) on the matter of notice, to wit, that notice is not enough for the purpose, arose under 27 Eliz. c. 4, and were decided in accordance with the English construction of that statute; which has always been peculiar, *Doe d. Otley v. Manning*, 9 East, 59. That construction has no bearing upon the meaning of 13 Eliz. c. 5, and indeed has long since been obsolete in this country. See chapter 21.

Proof of want of consideration would be enough in Massachusetts (as well as elsewhere), if the sale was made with intent on the part of the vendor to defraud. *Clark v. Chamberlain*, 13 Allen, 257, 260, 261; *Blake v. Sabin*, 10 Allen, 340; *Marden v. Babcock*, 2 Met. 99, 104. And this though the conveyance proceed, not from the debtor, but from another by the debtor's procurement. *Clark v. Chamberlain*, *ut supra*.

In a case of purchase for value the New York law requires knowledge or belief that the vendor intended to defraud. *Parker v. Conner*, 93 N. Y. 118 (explaining *Baker v. Bliss*, 39 N. Y. 70); *Stearns v. Gage*, 79 N. Y. 102. This turns on the statute. 2 R. S. 137, §§ 4, 5. See also *Jaeger v. Kelly*, 52 N. Y. 274; *Sisson v. Roath*, 30 Conn. 15; chapter 15, § 2, acts 'naturally innocent.' The New York cases are denied in *Hooser v. Hunt*, 65 Wis. 71. See *Avery v. Johnson*, 27 Wis. 246.

Further see *Hamilton v. Cone*, 99 Mass. 478 (minor cannot participate); *Beals v. Guernsey*, 8 Johns. 451; *Coon v. Levi*, 49 Mich. 208; *Seager v. Aughe*, 97 Ind. 285; *Dupuy v. Sheak*, 57 Iowa, 361 (the language of which, in view of the later Iowa cases, *supra*, must be considered as unguarded); *Kellogg v. Aberin*, 48 Iowa, 299; *Hershy v. Latham*, 46 Ark. 542. Some of these cases speak of knowledge and even of notice as participation, which is clearly wrong.

¹ Ante, p. 7, note, 77-79; *York Bank v. Carter*, 38 Penn. 447.

property. To defeat him he must have participated with the debtor in some wrongful and fraudulent act aside from preference and purpose.¹ The following case² will serve to illustrate this feature of the statutes:—

The plaintiff in a suit to foreclose a mortgage was induced by the mortgagor to become surety for her in a certain

¹ *Albert v. Besel*, 88 Mo. 150; *Holmes v. Braidwood*, 82 Mo. 610; *Forrester v. Moore*, 77 Mo. 651; *Shelley v. Boothe*, 73 Mo. 74; *Carpenter v. Cushman*, 121 Mass. 265; *Giddings v. Sears*, 115 Mass. 505; *Banfield v. Whipple*, 14 Allen, 13; *Ferguson v. Spear*, 65 Maine, 277; *Thompson v. Furr*, 57 Miss. 478; *Lehman v. Kelly*, 68 Ala. 192; *Warren v. Jones*, ib. 449; *Seaman v. Nolen*, ib. 463; *Crawford v. Kirksey*, 55 Ala. 282; *Sisson v. Roath*, 30 Conn. 15; *Kirtland v. Snow*, 20 Conn. 23; *Hawes v. Mooney*, 39 Conn. 37; *Bassett v. McKenna*, 52 Conn. 437; *Edwards v. Stinson*, 59 Ga. 443; *Hightower v. Mustian*, 8 Ga. 506; *Wheaton v. Neville*, 19 Cal. 41 (which incautiously speaks of 'a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts; more than 'real design' is necessary); *Christian v. Greenwood*, 23 Ark. 258 (where the distinction is drawn clearly and correctly); *Eureka Iron Works v. Bresnahan*, 66 Mich. 489; *Hough v. Dickinson*, 58 Mich. 94; *Sexton v. Anderson*, 95 Mo. 373; *Bedford v. Penny*, 58 Mich. 424 (the distinction clearly made); *Cron v. Cron*, 56 Mich. 8 (creditor took too much); *Munson v. Arnold*, 55 Mich. 134; *Andrews v. Fillmore*, 46 Mich. 316; *King v. Kenan*, 38 Ala. 63; *Globe Ins. Co. v. Thacher*, 87 Ala. 453. See ante, p. 7, note, 77-79.

But in *Holt v. Creamer*, 34 N. J. Eq. 181, before the Vice-Chancellor, it appears to have been held that a pre-

ferred creditor (mortgagee) is bound by notice merely. There is support for that position, if it is founded upon statute. *Muirh Smith*, 35 N. J. Eq. 303, knowledge participation. The New Jersey has confused the case of preference sale to a stranger. See also *Croshaw v. Kittridge*, 7 Met. 520 (goes too far); *Cromelin v. McCaul*, Ala. 547.

On the other hand it was said by the court in a dictum in *Meyer v. Bacher*, 76 Ala. 120, to say that fraudulent intent by one or both parties would not vitiate a preference. The rule as to 'fraud without damage' is a rule of actions for deceit, not of the present subject. Chapter 16.

Further see *Moore v. Roe*, 35 N. J. Eq. 90 and 526, conveyance by a father to his mother partly as a preferred creditor; *Lawson v. Funk*, 108 Ill. 108; *Shelton v. Church*, 47 Conn. 420, purchase by creditor insolvent debtor for one-fourth of the value of the property, in evidence of trust, and hence fraudulent; *Starr v. Plant*, 28 Conn. 377; *Smith v. Skeary*, 47 Conn. 47, preference given to a corporation of certain directors; *Croshaw v. Haworth*, 25 Cal. 653; *Raeburn v. Buffington*, 10 Cal. 491.

The fact that certain secured creditors are stockholders or officers of a corporation assigning for its creditors does not make a case of participation. *Globe Ins. Co. v. Thacher*, supra; *Lick Oil Co. v. Marbury*, 91 U. S. 116.

² *Buck v. Voreis*, 89 Ind. 116.

ter, taking the mortgage for his proportion. The mortgagor had represented that the property was free from incumbrance, whereas it was incumbered by a judgment in favor of B: and on that judgment the property is sold, and B becomes the purchaser. The sale is made to defeat the plaintiff, and the property is left in the possession of the mortgagor, under agreement with B that he should hold the title for the use of the mortgagor until she desired a reconveyance. The plaintiff knows nothing of the judgment until after the sale, and has tendered the amount due to B. The conveyance to B is fraudulent, and the plaintiff is entitled to foreclose the mortgage and redeem from the sale. What made the transaction fraudulent on the part of B was his aiding, with knowledge of the rights of the plaintiff, the attempt to keep the property for the mortgagor; that was participation in a wrongful and fraudulent act,¹ and that is the common case.²

But the question may be raised whether participating in the debtor's act, in a matter e. g. of assenting to a trust or reservation out of the fund turned over, is enough to affect the validity of the transfer as regards the position of the participant. In principle it would seem not enough; for in reality there is nothing as yet to show that the participant in the transaction is a participant in the debtor's wrongful intent. The creditor may not know, and may have no reason to know, what the debtor knows, to wit, that there are other creditors. And this view is supported by authority also; the rule having been declared to be that, while the debtor himself may be guilty of fraud, the creditor with whom he is dealing is not a participant in the guilt unless he knew or had been put upon notice of the fact that there were other creditors who had not given their assent to the transaction.³ The purchaser may however, it should be specially observed, have purchased from

¹ See *Giddings v. Sears*, *supra*, at p. 508.

³ *McDowell v. Steele*, 87 Ala. 498; *Miller v. Lehman*, *ib.* 517.

² See cases in note 1, p. 491.

his debtor as a stranger, and not by way of preference; in which case he will stand upon the footing of an ordinary purchaser, so as e. g. to be affected with notice like any stranger.¹

Apart from the subject of the last paragraph, what has here been said in regard to preference should in principle be true, as has elsewhere been remarked, of assignments and deeds of trust for creditors, executed, so far as external acts are concerned, in due conformity to law. In such cases the assignment is at most only a preference of creditors, and therefore, if preference itself would be lawful, should not be rendered invalid by any intention in the mind of the assignor to delay or defraud any of his creditors; and that too even though there be knowledge of this fact on the part of the assignee and of those creditors who accept the terms of the instrument. This doctrine, on one ground or another, is in accordance with the current of authority too;² and perhaps, if regard be had to the distinction between intention in such cases and the intent to defraud made by provisions against creditors' rights or other like external acts,³ there is not very much authority opposed to the doctrine. The distinction taken against assignments, when these, apart from the assignor's personal intention, are in conformity with law, is difficult to understand; the form of preference cannot be material, unless statute clearly makes it so.⁴

¹ *Redhead v. Pratt*, 72 Iowa, 99.

² *Emerson v. Senter*, 118 U. S. 1; *Cornish v. Dewa*, 18 Ark. 172, 181; *Hunt v. Weiner*, 39 Ark. 70, 75; *Thomas v. Talmadge*, 16 Ohio St. 433, 439; *State v. Keeler*, 49 Mo. 548; *Byrne v. Becker*, 42 Mo. 264; *Governor v. Campbell*, 17 Ala. 566; *Wilson v. Eifler*, 7 Coldw. 31.

But see *Savage v. Knight*, 92 N. Car. 493; *Eigenbrun v. Smith*, 98 N. Car. 207; *Rathbun v. Platner*, 18 Barb. 272; *Wilson v. Forsyth*, 24 Barb. 105; *Putnam v. Hubbell*, 42 N. Y. 106, 114. See also *Cuyler v. McCartney*, 40 N. Y.

221; *Loos v. Wilkinson*, 110 N. Y. 195; s. c. 113 N. Y. 485.

³ *Mead v. Phillips*, 1 Sandf. Ch. 83; *Mathews v. Poultney*, 33 Barb. 127; *Hunt v. Weiner*, supra. See *Putnam v. Hubbell*, supra; *Cuyler v. McCartney*, supra, at pp. 232, 233; *Loos v. Wilkinson*, supra.

In this last case there is clear participation in the fraudulent intent, and the assignment is rendered invalid. See chapter 12.

⁴ See *Rathbun v. Platner*, supra.

Purchase of land (or perhaps of chattels) by quit-claim has been a subject of some conflict of authority. A purchaser by quit-claim does not, it is common to say, acquire or expect to acquire anything more than the vendor has, however little that may be, and, in the absence of misrepresentation or other fraud,¹ can have no action against the vendor in case of his own disappointment; and it is considered to follow that if it turns out that his vendor was a volunteer under a conveyance in fraud of creditors, or if such vendor was privy to that fraud, the quit-claim purchaser will take under the same disability.²

This is not saying, it will be observed, that the quit-claim purchaser cannot as such be a purchaser for value; obviously that would not be true; he cannot be a volunteer if he has paid, as ordinarily is the case, a valuable consideration for the estate. It must mean then that the purchaser falls without the other term of the saving of the statutes; he is not a bona fide purchaser; somehow he is affected with notice. But it is pertinent to inquire, what sort of notice; absolute or actual notice, like that of the registry of deeds, or constructive notice, by putting one upon inquiry?³

Absolute notice however, being harsh and arbitrary and standing only on public policy, is exceptional; it is e. g. matter of statute, or in case of parties having defences to negotiable paper against takers after maturity. It can hardly be considered necessary to say, peremptorily, that because a purchaser has not taken a warranty, or has not been deceived by a conveyance in fee or by misrepresentations, that he must take with notice that his vendor has no right to hold the property against another man's creditors. Upon such a footing an assignee (for value) of a mortgage, invalid in the hands of the mortgagee against the mortgagor's creditors,

¹ Fraud would give him a right of action. *Ballou v. Lucas*, 59 Iowa, 22; *Atwood v. Sanford*, 68 Maine, 38.

² *Stivers v. Horne*, 62 Mo. 473; *Ridgeway v. Holliday*, 59 Mo. 444.

³ See vol. 1, pp. 385-402.

could not hold the property (for an ordinary assignment mortgage is practically a quit-claim); which is contra the weight of authority.¹ The vendor of the quit-claim chaser had a title capable of being made perfect on sale; the true way of putting the case of such purchaser is that he expects to acquire whatever title it is possible for vendor to make, and that is all that can be said of a chaser for value in fee by warranty deed. Absolute it would be as unjust to the one as to the other. So far as present subject is concerned, the difference between the two should lie only in the matter of the liability of the vendor and the purchaser in case of the purchaser's disappointment; the purchaser by warranty having a right of action, the purchaser by quit-claim having none. It is not warranty that makes the purchaser's title good, but value paid in good faith.²

The only kind of notice then to test the case by is not to be put upon inquiry. But none know of the fraud except the parties to it; the vendor himself may know nothing about it. How is the quit-claim purchaser then to find out about the fraud? One is put upon inquiry only in regard to the title, which inquiry, diligently prosecuted, would disclose. The vendor will either not know of the fraud or will not disclose it. Must the purchaser then go back to the previous vendor? But the result would probably be the same. It is well settled by law that one is not affected with notice of wrongdoing by the knowledge of the wrongdoer, though the wrongdoer is an agent, because inquiry would probably be fruitless.³

This reasoning does not go to the extent of making the quit-claim purchaser as good as a purchaser in fee. The quit-claim purchaser is, assuredly, put upon inquiry of all

¹ Chapter 18, § 5.

² Upon the nature of warranty see *Bigelow, Estoppel*, 439, 440, 5th ed.

³ *Williamson v. Barbour*, 9 Ch. D. 529, 535; *Cave v. Cave*, 15 Ch. D. 639;

Kettlewell v. Watson, 21 Ch. D.

705; *Wilde v. Gibson*, 1 H. L.

605; *Dillaway v. Butler*, 135

479.

which inquiry would reveal ; he is put upon inquiry in regard to incumbrances and liens ; these are what he would naturally look for, and these would be apt to be disclosed.

This view of the subject is supported by a decision by the Supreme Court of Massachusetts in a recent case.¹ A sold land to B by quit-claim in fraud of creditors, B participating. B now sells to C by quit-claim. D, creditor of A, attaches the land as A's ; and in a writ of entry by D the judge instructs the jury that the quit-claim to C is conclusive that he is not a purchaser for value without notice. This was held erroneous ; the court declaring that the infirmity of title could not be treated as an existing incumbrance subject to which an innocent purchaser (for value) by quit-claim must take.²

Another case noticed at some length in the preceding chapter should be referred to here ; and that is the case of payments made by a purchaser partly before and partly after notice that the seller sold with intent to defeat his creditors. So far as payments were made before notice, the purchaser will be protected, even though the sale is set aside ; but payments made after notice are (if not on negotiable paper in the hands of a bona fide holder for value) in the buyer's own wrong. Still the purchase, being originally good, does not become invalid by reason of the notice, and the buyer may hold the property by paying to the creditors, to the extent of

¹ *Mansfield v. Dyer*, 131 Mass. 200.

² *Colt, J.* : 'The title of one who purchases of a fraudulent grantee, before the land is specifically attached under the statute, is good against the creditors of all previous owners in the absence of such evidence [participation or the like]. *Gen. Sta. c. 123, § 55 ; Snow v. Paine*, 114 Mass. 520 ; *Clark v. Chamberlain*, 13 Allen, 257 ; *Hubbell v. Carrier*, 10 Allen, 333 ; *Oriental Bank v. Haskins*,

3 Met. 332. And it makes no difference . . . that the tenant acquires his title from a fraudulent grantee by a deed of release and quit-claim. . . . The deed is good in all cases between the parties, however fraudulent the intent ; and an infirmity of title cannot be treated as an existing incumbrance subject to which an innocent purchaser must take the estate if he takes by quit-claim deed only.'

their demand, the amount remaining due on the purchase-price.¹

Want of good faith however, like 'intent' to defraud, is not to be taken literally, even if we disregard the question whether constructive notice is enough. Certain facts make a case of want of good faith, whether there was any purposed wrongdoing in the purchaser or not. Probably most of the facts of that sort which would answer the 'intent' to defraud on the part of the debtor would equally establish want of good faith for the purpose of the saving of the law. Thus a purchaser of goods for value, who does not take possession, is a purchaser in bad faith, and not within the saving;² in some states as matter of law absolutely, in others and more generally by *prima facie* presumption.³ A like case is made by a purchase of land subject to a secret reservation in favor of the vendor of the right to the use and enjoyment of the property thereafter without payment.⁴ Indeed it all comes to this, that to be privy (in a broad sense) to the 'intent to hinder, delay, or defraud' of the statutes is necessarily bad faith, whatever the nature of such intent on the part of the debtor or of the motive of the purchaser.⁵

It should be remarked however that a volunteer is not as such, in strictness, a taker in bad faith; and the fact is sometimes of importance.⁶ The position of the taker or grantee is often very different from that of the giver or grantor. But the taker, being a volunteer, can have no better right to the property than the person from whom he took it.⁷ In this

¹ See chapter 18, § 8. The cases generally are purchases of land. As to cases of personalty see *Crockett v. Phinney*, 33 Minn. 157, which leaves a doubt in regard to the rule.

² *Flagg v. Pierce*, 58 N. H. 348; *Lang v. Stockwell*, 55 N. H. 561; *Phillips v. Reitz*, 16 Kans. 397. Such too was *Twyne's Case*, 3 Coke, 80.

³ See ante, p. 356. See *Ladd v. Newell*, 34 Minn. 107.

⁴ *Dean v. Skinner*, 42 Iowa, 418.

⁵ *Lang v. Stockwell*, 55 N. H. 561, as to trusts.

⁶ Vol. 1, p. 403.

⁷ *Ib.* See also vol. 1, p. 131, note 3. It is not necessary that a volunteer should have notice of the grantor's in-

particular then a fact which brings the vendor-debtor within the statutes against fraudulent conveyances, that is, makes him guilty of fraud upon his creditors, does not and should not of itself make the taker guilty of fraud; to say that the taker cannot keep the property is not to impute wrongdoing to him. The situation of the two parties is far from being the same as regards 'intent' to defraud; and that should never be overlooked.¹

Generally speaking creditors can take no advantage of frauds, such as false representations, committed upon their debtor in the purchase of his property or in drawing him into contracts; it is the *debtor's* intent to defraud for which the statutes in favor of creditors provide. But suppose the debtor sell property to another in good faith, on credit, the buyer intending not to pay and not having paid for it; may this be treated as in effect a voluntary conveyance, though technically for value, so as to be capable of coming within the statutes? This may be doubted if the sale is in the due course of business; but if in the transaction the debtor has reason to know the purpose of the buyer, or if he knows that he is entirely unable to pay and has no reason to suppose that he will have, or will be provided with, means to pay at the time agreed upon, then, it seems, though there is a valuable consideration in the promise to pay, the sale is not made, just as the property is not obtained, in good faith.²

tent. *Spaulding v. Blythe*, 73 Ind. 93; ante, p. 84.

¹ *Cansler v. Cobb*, 77 N. Car. 30. Even knowledge of the vendor's fraud would not alone make the purchaser guilty of fraud; to take the property under such circumstances would only be bad faith or *constructive* fraud. Vol. 1, p. 385; also *ib.* *Intro.* xii. Bad faith and fraud, though co-incidental at a certain point, are no more the same thing than are two roads run-

ning in different directions which become indiscriminate where they cross.

See *Hough v. Dickinson*, 58 Mich. 89.

² Upon this subject see *Lynch v. Beecher*, 38 Conn. 490, which appears to go further than the text, and to assert a right in creditors to take the property solely on the ground of the purchaser's intent not to pay. Seymour, J.: 'Hitchcock has no title to the property as against the plaintiff [a creditor of Hitchcock's vendor], his apparent

§ 2. INADEQUACY.

Another and a common fact which may show or tend to show want of good faith is inadequacy of consideration in the sale of property by a debtor. It might indeed seem at first that inadequacy of consideration would fall within the meaning of 'delaying' or 'hindering' creditors, and so bring the case within the general prohibition of the statute as well as within the proviso. But it is to be remembered that the words, as they have been interpreted by the courts, are words of art, or at all events are not to be taken broadly. A debtor, even if insolvent, may exchange his land for goods, or stocks or bonds, or sell it for cash; it matters not that he may in point of fact delay or hinder his creditors, as frequently it will; there is no delaying or hindering within the meaning of the statute.¹ But it may be said that where there is an alienation for inadequate consideration, the delaying of creditors within the statute, since there is a unitary alienation just so far as the price received falls below the real value of the property. The ordinary answer to this, however, is borrowed from the general rule in contracts:

title having been obtained by sheer fraud, by a promise to pay which at the time he did not intend to keep. Now conceding that Hitchcock might convey a good title to a bona fide purchaser for value, such a purchaser, in order to hold, must be a purchaser in absolute good faith and for value.' Such a purchaser the defendant was not, and he therefore stood upon the right only of Hitchcock, which was held not sufficient even against a creditor.

That certainly is natural justice, and perhaps the law of fraud should be extended accordingly; but as in the case put the fraud of the buyer is practised upon the seller alone, and the seller's conduct is not wrongful in any way, it is doubtful whether the law as it stands

can be deemed to extend to the case. For if it extends to such a case, it extends to all cases of fraudulent purchase where the fraud is solely in the purchaser, as where he has made false representations! See upon this point *Richards v. Silvester*, L. R. 9 Q. B. 54; *Parker v. Gurney*, L. R. 6 H. L. 377; *Zabala v. Smith*, 13 N. Y. 322; *Carver v. Jacks*, 43 Ark. 454; vol. 1, p. 19.

¹ *Ante*, p. 87; *In re Johnson*, 2 D. 389, 394, Fry, J.; *Copis v. Milton*, 2 Madd. 410, 430. Indeed not enough, it seems, to defeat a unitary conveyance that a creditor thereby prevented, in the event, obtaining payment. *Freeman v. L. R.* 5 Ch. 538.

which it is declared that the courts cannot undertake to measure sufficiency of consideration until the insufficiency is such as to indicate fraud;¹ the buyer may be within the saving of the statute notwithstanding inadequacy.

In most of the cases that arise however the difficulty, as was said by Sir Thomas Plumer in a case² much cited, has been to say, when there are no other indications of fraud, what is a sufficient consideration, or rather what amounts to such inadequacy as to make of itself a case for the operation of the statute. 'The court has not been very particular,' said Sir Thomas in the case cited, 'as to the sufficiency of the consideration, if the contract was bona fide,'³ that is, where there

¹ See e. g. *Lund v. Equitable Life Assur. Soc.* 81 N. J. Eq. 355; *First National Bank v. Cummings*, 38 N. J. Eq. 191; *Hoboken Bank v. Beckman*, 33 N. J. Eq. 53; s. c. 36 N. J. Eq. 83; *Paulk v. Cooke*, 39 Conn. 566; *Shelton v. Church*, 38 Conn. 420 (inadequate price paid by creditor to insolvent debtor raises 'a violent presumption of a secret trust'); *Galner v. Russ*, 20 Fla. 157; *Loring v. Dunning*, 16 Fla. 119; *Spear v. Rood*, 61 Mich. 140; *Dyer v. Rosenthal*, 45 Mich. 588; *Gordon v. Tweedy*, 71 Ala. 202; *Moorer v. Moorer*, 87 Ala. 545; *Robinson v. Bliss*, 121 Mass. 428. If the property in question is exempt from creditors' claims, it does not matter how inadequate the consideration. *Pulte v. Geller*, 47 Mich. 560.

Inadequacy will 'shock the conscience' and show fraud 'when the consideration is so far below the market value of the property as to strike the understanding of an intelligent and honest man with the conviction that such a sale could never have been made in good faith.' *Gordon v. Tweedy*, 71 Ala. 202, *Somerville, J.* But gross inadequacy is treated as only an indication of fraud, in *Bickler v. Kendall*, 66 Iowa,

703. See also *Almond v. Gairdner*, 76 Ga. 699. Comp. *Milner v. Davis*, 65 Iowa, 265. Further see *Irish v. Bradford*, 64 Iowa, 803; *Ward v. Rivers*, ib. 412; *Irby v. Blain*, 31 Kans. 716; *Trieber v. Andrews*, 31 Ark. 163.

And inadequacy however great will not, of itself, it has sometimes been held, suffice to overturn a judicial sale. *O'Callaghan v. O'Callaghan*, 91 Ill. 228, sale of property worth \$4,000 for \$10 upheld between the parties. See *Mathison v. Prescott*, 86 Ill. 493; *Mead v. Conroe*, 113 Penn. 220; *Cole v. Lee*, 45 N. J. Eq. 779. But see *Miller v. Koertge*, 70 Texas, 162, that the *grantee* of the debtor may raise the objections against the creditor of gross inadequacy at the execution sale.

The fraud will still be as circumvention, ordinarily, rather than as deception, in the sense in which those terms are used in this book; it will be 'endeavor to alter rights by wrongfully evading the law in a matter in which the person to be wronged is not a party.' Ante, p. 18.

² *Copis v. Middleton*, 2 Madd. 410.

³ Citing *Nann v. Ladbroke*, 8 T. R. 521. See also *Chamberlain v. Derance*, 69 Ala. 40.

was no other indication of want of good faith than inadequacy. A mortgage was referred to, by way of illustration; mortgages almost always include more in value than the amount of the debt; and that would not be a circumstance, if the discrepancy were not great.¹ Indiscriminate rule of discrimination has ever been generally agreed further perhaps than this, that inadequacy may be so decisive as to 'shock the conscience.'² Thus:—

The sale of property by an insolvent debtor for a small debt due the purchaser from a third person is purchased in bad faith.³ Again mortgaged premises had been sold by decree for deficiency rendered against the mortgagor. A night later, before sale, the mortgagor conveyed all his property worth \$50,000 to his sons, one a minor, in satisfaction

¹ *Nazro v. Ware*, 38 Minn. 443; *Mitchell v. Sawyer*, 115 Ill. 115; *Peters Saddlery Co. v. Schoelkopf*, 71 Tex. 418. Where however the sum due is far less than the sum mentioned as the consideration in the mortgage deed, there is presumptive evidence of fraud, but ordinarily no more. *Parker v. Barker*, 2 Met. 423. See also *Olmsted v. Mattison*, 45 Mich. 617; *King v. Hubbel*, 42 Mich. 597; *Willison v. Desenberg*, 41 Mich. 156; *Lombard v. Dows*, 66 Iowa, 243 (mortgage in excess of debt, on eve of insolvency); *Carson v. Byers*, 67 Iowa, 606 (same); *Taylor v. Wendling*, 66 Iowa, 562; *Wood v. Scott*, 55 Iowa, 114; *Whitredge v. Edmunds*, 63 N. H. 248; *Berry v. O'Connor*, 33 Minn. 29; *Crapster v. Williams*, 21 Kans. 109; *Goff v. Rogers*, 71 Ind. 459.

The presumption may be conclusive. *Stratton v. Putney*, 63 N. H. 577, where the mortgagor was embarrassed and gave a deed absolute for a loan less than the value of the property conveyed; *Wallach v. Wylie*, 28 Kans. 138; *Heintze v. Bentley*, 34 N. J. Eq. 562, intent in both parties to defraud;

Mitchell v. Sawyer, 115 Ill. 115; *Upton v. Craig*, 57 Ill. 259; *W. Fry*, 30 Ill. 158, 163; *Pennin Woodall*, 17 Ala. 685; *Wiley v. L.* 27 Ala. 336.

Further as to such cases see *Shull*, 33 Kans. 127; *Bush v. ib.* 556; *Colbern v. Robinson*, 8 541; *Moore v. Roe*, 35 N. J. E. 302; *Tully v. Harloe*, 35 Cal. 302; *v. Franks*, 67 Cal. 32; *Cron v. ib.* 56 Mich. 8; *Van Patten v. Thorpe*, 73 Iowa, 103; *Demarest v. Terl* C. E. Green, 532. A small excess preference will not avoid it. *L. Wagon Works v. Tidball*, 69 161.

² Sir Thomas Plumer in *C. Middleton*, supra; *Tebbs v. Lea*, 744. See *Seesel v. Ewan*, 35 Ar. that creditors in buying the property, put into their hands of security, do not stand on the of trustees buying the property cestui que trust, post, p. 506.

³ *Seymour v. Wilson*, 19 417.

alleged debt to them of \$8,000.¹ The transaction was held a fraud upon the mortgagee. Again a conveyance of property worth from \$7,000 to \$15,000 for \$100 is voluntary.² Indeed it has been held that a mortgage or deed of trust by an insolvent debtor to indemnify a surety on his bond is invalid against creditors if the liability was only nominal, and it turned out that there was no debt.³ But that is very dangerous doctrine; 'we must look at the matter as if the event had already happened,' at least where the liability is for an actual debt as distinguished e. g. from liability for conduct.⁴

It may indeed be true that where the difference between the consideration is a liquidated or certain sum, and is very material, inadequacy, in a question of creditor rights, would be matter for legal cognizance,⁵ nay would be treated as making per se a case for the operation of the statute, on the ground that there was pro tanto a voluntary alienation.⁶ There would be reason in that; and the suggestion may help to explain certain cases, such, e. g. as the following: Part of the purchase-money of a piece of land was paid by a husband (the buyer) with his wife's money; and part of the materials afterwards used in building a house upon the land were furnished by the wife, to whom they had been given by the husband's father. It was held that a conveyance of the house

¹ Hoboken Bank v. Beckman, 33 N. J. Eq. 58.

² Lionberger v. Baker, 86 Mo. 447.

³ Crawford v. Kirksey, 55 Ala. 282.

⁴ In re Ridler, 22 Ch. D. 74, Lord Selborne.

⁵ See Treat v. Curtis, 124 Mass. 348; Colgan v. Jones, 44 N. J. Eq. 274.

⁶ Stevens v. Dillman, 86 Ill. 233; Colgan v. Jones, supra. A mortgage may be taken to cover the fixed value of goods sold and of goods which the mortgagee promises to furnish and furnishes, if in good faith. Sanders v. Farrell, 83 Ind. 28, where the mortgage was for one-half more than the

value of the goods at first supplied. 'A man cannot be said to be a bona fide purchaser who purchases from one who is insolvent all the insolvent's property at about half of its value.' Trice v. Rose, 79 Ga. 76, 78. That assumes that the purchase is by negotiation with the debtor, not at public sale. In Colgan v. Jones, supra, a debtor having a claim for bodily injuries against a railroad company assigned the same to a lawyer for \$330, who recovered \$4,000 of the company. It was held that, against creditors of the assignor, the assignee was entitled to claim only a reasonable lawyer's fee out of the \$4,000.

and lot by the husband to his wife could not be supported against creditors upon such a consideration.¹

In some states a stern rule appears to prevail. In one case² the court of Pennsylvania said that a sale by an insolvent debtor for an inadequate price was evidence of fraud;³ this would be everywhere agreed if there were other indications, so that the result might not turn upon mere inadequacy.⁴ In another and more recent case⁵ the same court however declared that the sale of lands or goods by an insolvent debtor at less than their value was *ipso facto* fraudulent in both seller and buyer.⁶

Again it has been declared in Iowa that where, in the case of a sale, the difference between the price paid and the actual value of the property is 'apparent and great,' the conveyance will be treated as voluntary to the *extent* of the difference.⁷ In Illinois the court has said that it is sufficient consideration for a settlement by a husband upon his wife that the wife parts with her dower⁸ or other estate, or agrees to create a charge thereon for the benefit of her husband; but the value of the estate parted with, it is also declared, must bear a reasonable proportion to the value of the thing settled upon the wife.⁹ 'If the value,' says the court of Illinois, 'of the

¹ *Aber v. Brant*, 36 N. J. Eq. 116. See also *Knowlton v. Hawes*, 10 Neb. 534, conveyance by father to son. There is however no presumption that a conveyance by a husband to his wife, purporting to be for value, is voluntary, nor is it enough to show that the wife has received nothing from her father's or mother's estate. *Stephenson v. Cook*, 64 Iowa, 265. See however *Sloan v. Torry*, 78 Mo. 623.

² *Davidson v. Little*, 22 Penn. St. 245.

³ But see *Chamberlain v. Dorrance*, 69 Ala. 40.

⁴ See e. g. *Milner v. Davis*, 65 Iowa, 265.

⁵ *Rhoads v. Blatt*, 84 Penn. St. 31.

⁶ See *Roberts v. Radcliff*, 35 Kana. 502, such sale with long credit.

⁷ *Strong v. Lawrence*, 58 Iowa, 55, citing *Bump*, *Fraud. Conv.* pp. 288, 289; *Norton v. Norton*, 5 Cush. 524; *Church v. Chapin*, 35 Vt. 223; *Worthington v. Bullet*, 6 Md. 172; *Robinson v. Stewart*, 10 N. Y. 189; *Keeder v. Murphy*, 43 Iowa, 413. See also *Milner v. Davis*, 65 Iowa, 265.

⁸ *Singree v. Welch*, 32 Ohio St. 320.

⁹ *Ib.*, where it is said that the court will not readily consider the excess unreasonable; *Hershy v. Latham*, 46 Ark. 542, treating it as a matter for equity.

settled property exceeds the value of the estate the wife parts with, the settlement should be set aside as to the excess.¹ And in North Carolina it said that in a case of fraud on the part of the grantor the purchaser must pay a fair price, not necessarily the full value, but a price such as would not cause surprise.²

On the whole there is a tendency, unprofessed perhaps, on the part of some of the courts, in this matter of statutes against fraudulent conveyances, to depart somewhat from the general rule of contract, that inadequacy must be so gross as to 'shock the conscience,' or, as it has sometimes been expressed, but too strongly, as to be 'demonstrative of fraud;'³ leaving that rule apparently to apply to transactions *inter partes*,⁴ that is, to cases of 'deception,' as we use that term, and to treat a sale upon very material inadequacy as so far, towards creditors, voluntary. There is ground for such a distinction; a creditor is at a great disadvantage as compared with one who is face to face and dealing with another; a creditor may be circumvented when he knows nothing of what is going on; a buyer can hardly buy without reckoning upon the possibility of deception being practised upon him by the seller. And to this observation should be added the vast temptation of a debtor in embarrassed circumstances. In bankruptcy laws the distinction clearly appears.

If however we accept the general current of authority in

¹ Patrick v. Patrick, 37 Ill. 555. See chapter 18, § 9, note.

² Worthy v. Caddell, 76 N. Car. 32; Fullenwider v. Roberts, 4 Dev. & B. 278. As to sales for 'fair price' see Bates v. Fuller, 8 Lea, 644. And comp. the rule in bankruptcy of 'fair consideration,' post, chapter 22, in Fraudulent Open Preference.

³ But see Bickler v. Kendall, 66 Iowa, 703. And see Gordon v. Tweedy, 71 Ala. 202, quoted *supra*, p. 500, note,

and applying the general rule of inadequacy in contracts — that the inadequacy should shock the conscience — to the present subject.

⁴ Even in such cases gross inadequacy, by the better rule, is only evidence of fraud; which the other facts in the case may overturn. Harrison v. Guest, 8 H. L. Cas. 481, a. c. 6 De G. M. & G. 424; Jones v. Gordon, 2 App. Cas. 616; Karl v. Peck, 64 N. Y. 596.

regard to fraud upon creditors, it appears to be difficult to frame any rule, on the footing of inadequacy alone as destructive of fraud, as matter of law, which does not demand that the inadequacy should be great;¹ it should be sufficient to point directly to wrongdoing in the transaction. For the purpose of declaring a man bankrupt, under bankruptcy legislation, it may be enough to say that clear inadequacy is sufficient; but for the purpose of establishing fraud, it may be a different thing, such a statement would be strong in most states. It would however appear to be reasonable on the current of authority, to say that creditors may complain of inadequacy when a party to the sale or conveyance could not.

Whenever there is other indication of want of good faith in the buyer, it is perfectly clear that the fact that the conveyance was made upon an inadequate consideration should be taken into account, in considering the rights of the creditor.² In a recent New Jersey case³ an embarrassed debtor

¹ *Shay v. Wheeler*, 69 Mich. 254. See *Rusie v. Jameson*, 62 Iowa, 52. Seevers, J.: 'Giving all possible weight to the evidence, the inadequacy is not great, and is not sufficient, we think, to evidence a fraudulent purpose.' See also *Strong v. Lawrence*, 58 Iowa, 55, inadequacy 'apparent and great' held to make the conveyance so far voluntary. It is laid down in Connecticut, quoting a statement in Swift's Digest, that 'in every instance where a creditor or purchaser obtains the estate of an insolvent debtor at an under rate there is a violent presumption of a secret trust and fraudulent intent.' *Shelton v. Church*, 38 Conn. 420. But that proposition would, it is apprehended, be regarded by other courts as rather sweeping. In *Shelton v. Church* a creditor had taken all of his insolvent debtor's property for a debt less than a

fourth the value, and for about a fifth of what another offered and stood ready to give. That was a clear case.

² *Robinson v. Bliss*, 121 Mass. 396; *Brown v. Texas Hedge Co.*, 64 Tex. 396; *Spear v. Rood*, 51 Mich. 396; *Irish v. Bradford*, 64 Iowa, 303; *Cleburne v. Stern*, 11 Nev. 268; *Roe v. Radcliff*, 35 Kans. 502; *Van Dyke v. Van Dyke*, 31 N. J. Eq. 176; *Moores v. Roe*, 35 N. J. Eq. 90 and 526; *Johnson v. King*, 86 Ill. 225; *Paulk v. Coates*, 39 Conn. 566; *Washburn v. Washburn*, 27 Conn. 424; *Barrow v. Bailey*, 59 N. J. Eq. 9; *Wilson v. Lott*, ib. 305; *Eaton v. Thompson*, 109 Ill. 87; *Hoppe v. Cheek*, 21 Ark. 585. Comp. also *Ford v. gold v. Waggoner*, 14 Ark. 69; *Peabody v. Webster*, 2 Cush. 480; *Peebles v. Horton*, 64 N. Car. 374; ante, pp. 484.

³ *Randall v. Vroom*, 30 N. J. Eq.

had conveyed to his sisters his undivided half of a farm, they being owners of the other half, a few days before the service of a summons upon him, upon consideration that the sisters should assume the incumbrances upon his interest, which were less in amount than the value of his interest. There were indications that the conveyance was not made and taken in good faith; and it was set aside at the instance of creditors.

A case¹ recently occurred in Arkansas, which will further serve to illustrate the matter. Land of A was bought at an inadequate price by A's minor son, who was without means and was at the time residing with his father. A was in failing circumstances at the time, and had already transferred to his other children other property in fraud of his creditors. The sale was held fraudulent towards A's creditors.

Creditors to or for whom the debtor's property has properly been transferred by way of security, do not in afterwards buying the same, as e. g. at public sale, stand upon the footing, towards other creditors, of trustees buying the property of their cestuis que trust; the rules in regard to which are very stringent, and rightly so, in respect of adequacy of consideration. Mere creditors are deemed strangers to the trust as such in their favor, and have the same rights touching the property which they would have if the debtor were selling directly, without the intervention of a trustee. The question then of the adequacy of the consideration is the ordinary one of good faith.²

¹ *Massie v. Enyart*, 32 Ark. 251.

² *Seesel v. Ewan*, 35 Ark. 127, an important case. Eakin, J. : 'Perhaps if a fraud were committed against the grantor in a deed of trust by the trustee and purchasers, subsequent judgment creditors, on bill filed, might be let into his rights to attack the sale, for the augmentation of the surplus; but that

is not this case. The question is simply one of bona fides on the part of Harris, Mallory, & Co., in the consideration of which the adequacy of the price forms an element. . . . It is true, as urged, that sales by trustees in pais, under powers, are narrowly watched. They may be oppressive, and are not encouraged. If application be made in

It may be pertinent to inquire, in a state in which Massachusetts, notice of the debtor's intent to defraud creditors is not enough to defeat the claim of a purchaser for value, what the effect of the showing of inadequacy of its effect is only to establish notice, the purchaser, if it must be observed is a purchaser for value, will hold the property still; the contrary will be true if the inadequacy is deemed to establish participation. The effect, it may be suggested, would depend upon circumstances; with significant facts, or alone if the inadequacy were 'shocking' it might well be deemed sufficient to make a case of participation;¹ otherwise it would probably make at most only a case of notice.

Assuming that the consideration by the *debtor* is or is not out to be inadequate, the question may arise whether the property may be added, under the cover of the original consideration alone; may the consideration in this respect be treated as executory, or must such addition be treated as voluntary and so, even in the purchaser, as in fraud of the seller's creditors? To give a negative answer would certainly be dangerous, in view, for one reason, of the cupidity of

reasonable time, they will be set aside on slight equities. But that jealousy is not to be indulged beyond reason. The practice is common, and much of the property of the country is held under such sales. They facilitate business. They should be sustained when made in strict pursuance of the power, in good faith, and not detrimental to vested rights in the property.' As to the first suggestion of the learned judge quære. It is the *debtor's* fraud, not fraud upon the debtor, for which the statutes against fraudulent conveyances give relief (*Erb v. Cole*, 31 Ark. 554; ante, chap. 3); though the two may sometimes concur, as they did in *Cornish v. Clark*, L. R.

14 Eq. 184, ante, p. 85, and note. See also *Todd v. Nelson*, 109 N. Y. 324; *Hall v. Moriarty*, 57 Mich.

¹ When it is said that shocking gross inadequacy may establish the meaning properly is, fraud in the vendor and debtor, and *notice* or *participation* in the buyer. Would it be the buyer alone, to defraud the seller's creditors come within the meaning of the statutes against fraudulent conveyances, on a sale for full value? See *Cornish v. Clark*, L. R. 14 Eq. 184; *Todd v. Nelson*, 109 N. Y. 316; which seem to imply the affirmative. See however *Hall v. Moriarty*, 57 Mich. 345.

It might in many cases be easy to make up evidence to show that a consideration treated by the parties at the time as sufficient had turned out to be, or was in the outset, inadequate, and so to let in other property afterwards in manifest wrong to creditors of the vendor. And besides, the matter is, generally speaking, at an end in law notwithstanding the inadequacy; that is, the law will not hear of inadequacy.

On the other hand it would not be safe to deny that there could be a case of subsequent addition under cover of the old consideration alone. In a case¹ in Massachusetts a bill in equity was brought by an assignee in insolvency of C to redeem land from mortgages by C to the defendants. C had afterwards quit-claimed his equity of redemption to the mortgagees, with intent to defraud his other creditors. But there was no evidence that the defendants participated in the intent;² and the court sustained their claim to the equity, on the footing that it appeared that the debt due equalled the whole value of the mortgaged premises. The whole debt must be paid.³

This would seem to suggest the principle upon which an additional alienation might fall under the cover of the old consideration. There has been a transaction between the parties in which the consideration in question was not in point of law either a satisfaction or an equivalent for what is represented by it; and to the extent of making that satisfaction or equivalent in law, but of course no further, subsequent

¹ Williams v. Robbins, 15 Gray, 590.

² See note 1, p. 509.

³ Merrick, J.: 'A conveyance of the equity of redemption by a mortgagor to a mortgagee without payment of a new consideration cannot be considered a voluntary conveyance and void as against creditors, when the amount due on the note or other obligation the payment of which is secured by the mortgage is equal to the whole value of the mortgaged premises. It is not like a con-

veyance of the same estate to a stranger. By operation of law, and without any special agreement of the parties on the subject, it effects a discharge of the mortgage debt either wholly, if the estate is sufficient, or pro rata if of less value than the amount due. To make such a transaction in any just sense a voluntary conveyance as against creditors, it must be made to appear that the estate was of greater value than the debt.'

additions may, it seems, be made under the protection of original consideration. This however is dangerous ground only less dangerous than what was suggested a moment ago and we have therefore guardedly spoken of a 'satisfactory equivalent in law.' It clearly would not be right to allow parties to show that the consideration was not adequate for the purpose of letting in the addition, where in point of fact it appears that what was first received from the debtor was taken in full return for the property or right of the purchaser. Indeed it may well be doubted whether the case in question is not, in any phase, one of preference only; a creditor's claim has not been fully satisfied; the debtor prefers himself he may, until the debt is satisfied. Consideration is lacking in the case.¹

¹ *Seymour v. Wilson*, 19 N. Y. 417, 421; *Murphy v. Briggs*, 89 N. Y. 446. This, it may be suggested, was the real nature of the Massachusetts case above referred to. Though spoken of in the language of purchase by the court, it was at most nothing more than a case of preference of (the supposed purchaser as) a creditor, and appears to have arisen under the laws of insolvency, and not under the statute of Elizabeth, though its treatment is ambiguous.

Indeed the Massachusetts case could hardly have risen so high as preference, for the debt was equal in value to the whole estate in fee, so that the mortgagee was entitled, under the mortgage itself, to take it all, equity of redemption included, as e. g. by foreclosure. What was given up therefore, in the conveyance or release of the equity, was nothing at all; though that might be different in a case in which there were liens in priority of the mortgage, — that is to say, the mortgagee would not be entitled to take the whole estate in such a case. Hence, it ought to be added that what the Massachusetts court says

about the question of fraud on the part of the mortgagee, though it would not have been relevant under the statute of Elizabeth, was in the actual case really relevant. The mortgagee was entitled to take the whole estate, and whether he was willing to help the mortgagee in defeating other creditors is beside the point.

Out of caution however the case is put in the text as one of purchase by the creditor. It seems to have been treated by the court. In any view of the matter it is important to observe that a creditor is not, because of being a creditor, debarred from becoming a purchaser of his debtor's property either under the statute of Elizabeth, or under insolvency law. This is a transaction distinct from his purchase of the debt. *Redhead v. Pratt*, 72 Iowa, 99. It is, purchase by the creditor need not be a preference; but where it is not a purchase, it must be for valuable consideration.

It is often difficult however to determine whether a particular case is one of preference of a debt or one of independent purchase by the creditor as a stranger. The notion of the debt is very

to creep in and confuse, as probably it was in some degree present at the time of the purchase; and the language of the courts is frequently tinged with the same confusion. 'The *sale* was made,' said Gibson, C. J. in *Gans v. Renshaw*, 2 Barr, 34, 36, 'when judgments were about to be obtained against the grantor, and though an insolvent may give such *preferences* to particular creditors as he may see proper, yet if the motive be, not payment of the debts, but in the language of the statute "to delay, hinder, or defraud" particular creditors, the conveyance though made on a valu-

able consideration, is not bona fide and therefore not saved by the proviso.' Quoted by Sharswood, J. in *Ferris v. Irons*, 83 Penn. St. 179. Of which is the court speaking, preference or purchase independent of the debt? Intent to defraud, known to the buyer, will avoid a sale; not so of a preference. Ante, p. 490. It is of importance to draw the line clearly, — to speak of preference as intended payment in whole or in part of a debt, and of purchase by the creditor as independent of the debt when that is the case.

CHAPTER XX.

THE STATUTE OF 27TH ELIZABETH: AMERICAN LEGISLATION.

THE statute of 27th Elizabeth, chapter 4, is as follows :—

§ 1. Forasmuch as not only the Queen's most excellent Majesty, but also divers of her Highness's good and loving subjects, and bodies politic and corporate, after conveyances obtained or to be obtained and purchases made or to be made, of lands, tenements, leases, estates, and hereditaments, for money or other good considerations, may have, incur, and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses heretofore made or hereafter to be made, of, in, or out of lands, tenements, or hereditaments so purchased or to be purchased; which said gifts, grants, charges, estates, uses, and conveyances were, or hereafter shall be, meant or intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased or shall purchase the same; or else, by the secret intent of the parties, the same be to their own proper use, and at their free disposition, colored nevertheless by a feigned countenance and show of words and sentences, as though the same were made bona fide, for good causes, and upon just and lawful considerations:

§ 2. For remedy of which inconveniences, and for the avoiding of such fraudulent, feigned, and covinous conveyances, gifts, grants, charges, uses, and estates, and for the maintenance of upright and just dealing in the purchasing of

lands, tenements, and hereditaments: Be it ordained and enacted, by the authority of this present Parliament, that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever, had or made any time heretofore sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterward purchase in fee simple, fee tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbered, or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit, or commodity in or out of the same, or any part thereof, shall be deemed and taken, only as against that person or persons, bodies politic and corporate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person or persons lawfully having or claiming by, from, or under them, or any of them, which have purchased or shall hereafter so purchase for money or other good consideration, the same lands, tenements, or hereditaments, or any part or parcel thereof, or any rent, profit, or commodity, in or out of the same, to be utterly void, frustrate, and of none effect; any pretence, color, feigned consideration, or expressing of any use or uses to the contrary notwithstanding.

§ 3. And be it further enacted by the authority aforesaid, that all and every the parties to such feigned, covinous, and fraudulent gifts, grants, leases, charges, or conveyances before expressed, or being privy and knowing of the same or any of them, which after the twentieth day of April next coming shall wittingly and willingly put in use, avow, maintain, justify, or defend the same or any of them, as true, simple, and done, had, or made bona fide, or upon good consideration,

to the disturbance or hindrance of the said purchaser or purchasers, lessees, or grantees, or of or to the disturbance or hindrance of their heirs, successors, executors, administrators, or assigns, or such as have or shall lawfully claim any by, from, or under them or any of them, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments so purchased or charged; the moiety whereof to be to the Queen's Majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent gift, grant, lease, conveyance, incumbrance, or limitation of use, to be recovered in any of the Queen's courts of record by an action of debt, bill, plea, or information, wherein no essoin, protection, or wager of law shall be admitted for the defendant or defendants; and being thereof lawfully convicted, shall suffer imprisonment for one-half year without bail or mainprise.

§ 4. Provided also, and be it enacted by the authority aforesaid, that this Act, or anything therein contained, shall extend or be construed to impeach, defeat, make void or frustrate any conveyance, assignment of lease, assurance, gift, charge, lease, estate, interest, or limitation of use or uses, in, to, or out of, lands, tenements, or hereditaments heretofore at any time had or made, or hereafter to be had or made, whether for good consideration and bona fide to any person or persons, bodies politic or corporate; anything before mentioned to the contrary hereof notwithstanding.

§ 5. And be it further enacted by the authority aforesaid that if any person or persons have heretofore, sithence beginning of the Queen's Majesty's reign that now is, now or hereafter shall make any conveyance, gift, grant, deed, charge, limitation of use or uses, or assurance of, in, or out of any lands, tenements, or hereditaments, with any clause, provision, article, or condition of revocation, determination or alteration, at his or their will or pleasure, of such conveyance, assurance, grants, limitations of uses or estates of

or out of the said lands, tenements, or hereditaments, or of, in, or out of any part or parcel of them, contained or mentioned in any writing, deed, or indenture of such assurance, conveyance, grant, or gift; and after such conveyance, grant, gift, demise, charge, limitation to uses, or assurance so made or had, shall or do bargain, sell, demise, grant, convey, or charge the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration paid or given (the said first conveyance, assurance, gift, grant, demise, charge, or limitation, not by him or them revoked, made void, or altered, according to the power and authority, reserved or expressed unto him or them in and by the said secret conveyance, assurance, gift, or grant) that then the said former conveyance, assurance, gift, demise, and grant, as touching the said lands, tenements, and hereditaments, so after bargained, sold, conveyed, demised, or charged against the said bargainees, vendees, lessees, grantees, and every of them, their heirs, successors, executors, administrators, and assigns, and against all and every person and persons which have, shall, or may lawfully claim anything by, from, or under them or any of them, shall be deemed, taken, and adjudged to be void, frustrate, and of none effect, by virtue and force of this present Act.

§ 6. Provided, nevertheless, that no lawful mortgage made or to be made bona fide, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of this Act, but shall stand in the like force and effect as the same should have done, if this Act had never been had nor made; anything in this Act to the contrary in any wise, notwithstanding.

§ 7. And be it further enacted by the authority aforesaid, that all the whole tenor and contents of all statutes-merchant and statutes of the staple, hereafter to be knowledged, shall, within six months next after such knowledging, be entered

in the office of the Clerk of Recognizances, taken according to the statute made in the three-and-twentieth year of the reign of the late King Henry the Eighth, by the shewing forth of the said statute-merchant or statute-staple so acknowledged unto the said clerk; which said Clerk of the Recognizances shall enter, or cause to be entered, the same statute into a book for that purpose to be provided and safely kept by him, taking eightpence and no more for every such entry.

§ 8. And be it further enacted, that if the party to such statute-merchant or of the staple shall be known to his executors, or administrators, do or shall not, within six months next after the knowledging of any such statute, shew and deliver, or cause to be brought and delivered, unto the said clerk, or his deputy or deputies for the time being, and every such statute and statutes as shall be so known to him or to his use, whereby and to the intent that the clerk, his deputy, or deputies, may take and enter a true copy thereof, that then every such statute-merchant and of the staple not so entered shall be void, frustrate, and of no effect, against all and every such person and persons, bodies politic and corporate, their heirs, successors, executors, administrators, and assigns only, as shall after the knowing of the said statutes, or any of them, purchase for money or other good consideration the lands, tenements, or hereditaments which were liable to the same statute-merchant or of the staple, or any part or parcel thereof, or any rent, lease, or profit of or out of the same.

§ 9. And if the said clerk, or his deputy or deputies for the time being, shall not upon such showing and delivery to him or them of any statute-merchant or of the staple enter and cause to be entered the same in his said book within the time of six months, and also indorse upon every such statute so by him entered the day and year of his said entry, and his or their own name, then every such clerk failing or neglectful in that behalf shall forfeit and lose for every statute

merchant and of the staple so brought unto him or them, and not entered and indorsed, or caused to be entered and indorsed as aforesaid, the sum of twenty pounds; the one moiety whereof to be to the Queen's Majesty, her heirs and successors, and the other moiety to him or them that will sue for the same in any of the Queen's courts of record, by action of debt, bill, plaint, or information, wherein no essoin, protection, or wager of law shall be allowed.

§ 10. And be it further enacted by the authority aforesaid, that no Clerk of the said Recognizances shall or may take, for or in respect of any search to be made for or concerning any statute-merchant or of the staple so to be entered as aforesaid, above twopence for one year's search, and so after the rate of twopence for every year and not above, upon pain to forfeit and lose to the party or parties grieved thereby twenty times as much as he shall take contrary to the true meaning of this act, to be recovered in any of the Queen's Majesty's courts of record, by action of debt, bill, plaint, or information, wherein no protection or wager of law shall be allowed. This act to continue for the space of ten years, and from thenceforth unto the end of the Parliament then next following.

§ 11. Provided always, that this act, nor anything therein contained, shall extend or be construed to make good any purchase, grant, lease, charge, or profit of, in, or out of any lands, tenements, or hereditaments heretofore made void, defeated, or undone by reason of any former conveyance, grant, or assurance, so as the party or parties, or their heirs or assigns, which have so defeated or made void the same, were in actual possession the first day of the present Parliament, of or in the said lands, tenements, or hereditaments whereof or out of which any such purchase, grant, lease, charge, or profit was made.

§ 12. Provided that this act, nor anything therein contained, shall extend in any sort to restrain or impair the jurisdiction, power, or authority of the Court of Star Chamber.¹

¹ Made perpetual by Stat. 39 Eliz. c. 18, § 32.

None of our American statutes is a literal transcript of the whole of the statute of 27th Elizabeth, even disregarding provisions in regard to statutes-merchant and statutes-which would be inapplicable to anything in this country. Some of them, while closely following the language of the English statute, as far as they go, have significant omissions; others, and this is more generally true, are framed throughout; often the American statute is part of a general statute relating to creditors and purchasers, sometimes including them in the same section, sometimes in separate sections. In some of the older states legislation is wanting, and the statute of 27th Elizabeth, so far as it is applicable to the condition of things here, is treated as part of the common law. But the American law general has drawn only upon the second, fourth, and fifth sections of the English statute; no other section, except with material modifications, has been following in this country.

The statute of New Jersey is the nearest to the English statute, if regard be had to the substance as well as to the specific language of the same as embraced in the second and fifth sections. That statute is as follows:—

§ 13. Every conveyance, grant, or alienation of lands, tenements, or hereditaments, or of any estate or interest therein which has been or hereafter shall be made with intent to defraud and deceive such person or persons as have purchased or shall purchase any such lands, tenements, or hereditaments, or any estate, right, or interest therein, shall be deemed and taken (only as against such persons, their heirs, executors, administrators, or assigns as have purchased or shall hereafter purchase such lands, tenements, or hereditaments, or any part thereof, or any estate, right, or interest therein for money or other good consideration) to be utterly void and of no effect; any feigned consideration, color, or other pretence to the contrary notwithstanding.

§ 14. If any person has made, or hereafter shall make, a

conveyance, gift, grant, demise, charge, or assurance of any lands, tenements, or hereditaments, with any clause, provision, condition of revocation or alteration, at his or her will or pleasure, contained or mentioned in any writing, deed, or indenture; and after such conveyance, gift, grant, demise, charge, or assurance so made, shall bargain, sell, demise, grant, convey, or charge the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons for money or other good consideration paid or given (the said first conveyance, gift, grant, demise, charge, or assurance not having been revoked or altered according to the power and authority reserved or expressed in the said secret conveyance, assurance, gift, or grant) then the said former conveyance, gift, grant, demise, charge, or assurance of the said lands, tenements, or hereditaments, shall be void and of no effect, as against such subsequent bargainees, vendees, lessees, grantees, and every of them, their heirs, successors, executors, administrators, and assigns, and every person or persons who may lawfully have or claim anything by, from, or under them or any of them.

The statute of South Carolina conforms more nearly to the English prototype in language, but it applies to future purchasers only. It is as follows:—

§ 16. Every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever, which may be had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as shall purchase in fee-simple, fee-tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part or parcel thereof, or to defraud and deceive such as have or shall purchase any rent, profit, or commodity in or out of the same, or any part thereof, shall be deemed and taken (only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, adminis-

trators, and assigns, and against all and every other and persons lawfully having or claiming by, from, or them, or any of them, which have purchased, or shall after so purchase, for money or other good consideration the same lands, tenements, or hereditaments, or any parcel thereof, or any rent, profit, or commodity in or the same) to be utterly void, frustrate, and of none any pretence, color, feigned consideration, or express any use or uses to the contrary, notwithstanding.

§ 18. Nothing contained in §§ 15, 16, and 17¹ of this act shall extend or be construed to impeach, defeat, void, or frustrate any conveyance, assignment of lease, or charge, grant, charge, lease, estate, interest, or limitation or uses of, in, to, or out of any lands, tenements, or hereditaments heretofore at any time had or made, or hereafter had or made, upon or for good consideration and bona fide to any person or persons, bodies politic or corporate, or any thing therein mentioned to the contrary, notwithstanding.

§ 19. If any person or persons have heretofore made or hereafter shall make any conveyance, gift, grant, or charge, limitation of use or uses, or assurance of, in, or out of any lands, tenements, or hereditaments, with any clause, proviso, vision, article, or condition of revocation, determination, alteration, at his or their will or pleasure, of such conveyance, assurance, grants, limitations of uses, or estates of, in, or out of the said lands, tenements, or hereditaments, or of, or out of any part or parcel of them contained or mentioned in any writing, deed, or indenture of such assurance, conveyance, grant, or gift; and after such conveyance, grant, demise, charge, limitation of uses or assurance so made or had, shall or do bargain, sell, demise, grant, convey, or convey the same lands, tenements, or hereditaments, or any parcel thereof, to any person or persons, bodies politic or corporate, for money or other good consideration paid

¹ This section provides for forfeitures and penalties only.

given (the said first conveyance, assurance, gift, grant, demise, charge, or limitation, not by him or them revoked, made void, or altered according to the power and authority reserved or expressed unto him or them in or by the said secret conveyance, assurance, gift, or grant) ; then the said former conveyance, assurance, gift, demise, and grant, as touching the said lands, tenements, and hereditaments, so after bargained, sold, conveyed, demised, or charged against the said bargainees, vendees, lessees, grantees, and every of them, their heirs, successors, executors, administrators, and assigns, and against all and every person and persons which have, shall, or may lawfully claim anything by, from, or under them, or any of them, shall be deemed, taken, and adjudged to be void, frustrate, and of none effect : *provided*, that no lawful mortgage made ~~or~~ to be made, bona fide, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of anything in this chapter contained.

The statute of Florida is as follows : —

§ 2. Every feoffment, deed, conveyance, mortgage, grant, charge, lease, transfer, assignment, estate, incumbrance, interest, and limitation of use or uses of, in, or out of any lands, tenements, or other hereditaments whatsoever, which shall at any time hereafter be had, made, executed, or contrived for the intent and purpose of defrauding and deceiving such person or persons, bodies politic or corporate, as shall afterwards purchase the same lands, tenements, and hereditaments, or any part thereof, or any estate, interest, rent, property, right, or commodity in, to, or out of the same, or any part thereof, so formerly conveyed, granted, leased, charged, transferred, assigned, incumbered, or limited in use, shall be deemed, adjudged, taken, and held, as against the person or persons, bodies politic and corporate, their heirs, successors, executors, administrators, and assigns, and against all and every person and persons lawfully having or claiming by, from, through, or under them, or any of them, who shall have so purchased for

money or other good consideration the same lands, tenements, hereditaments, or any part thereof, or any estate, right, interest, profit, benefit, or commodity in, to, or out of the same, to be utterly void, frustrate, and of none effect; any pretence, feigned consideration, or expressing of use or uses to the contrary, notwithstanding: *provided*, that nothing in this section of this act contained shall extend or be construed to impeach, make void, or frustrate any conveyance, assignment of lease, assurance grant, charge, lease, estate, interest, or limitation of use or uses of, in, to, or out of any lands, tenements, or hereditaments which shall be made upon and for good consideration, and bona fide, to any person or persons, bodies politic or corporate; anything in this section of this act to the contrary, notwithstanding.

§ 3. If any person or persons shall make any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance of, in, or out of any lands, tenements, or hereditaments, with any clause, provision, article, or condition of revocation, determination, or alteration, at his, her, or their will or pleasure, of such conveyance, gift, assurance, grant, demise, charge, limitation of use or uses, contained in the same, or in any other writing whatever, of, in, or out of the said lands, tenements, or hereditaments, or any part or parcel of them, and after such conveyance, grant, gift, demise, charge, limitation of uses or assurance so made or had, shall, or do bargain, sell, demise, grant, convey, transfer, or charge the same lands, tenements, or hereditaments, or any part or parcel thereof, or any estate, right, or interest in the same, to any other person or persons, bodies politic or corporate, for money or other good consideration (the said first conveyance, assurance, gift, grant, demise, charge, or limitation not being revoked, made void, or altered according to the power and authority reserved or expressed in and by the said first conveyance or other writing), that there the said former conveyance, assurance, gift, grant, demise, charge, or limitation, as touching the said

lands, tenements, and hereditaments, and estate, right, or interest in the same, so afterwards bargained, sold, granted, conveyed, demised, transferred, or charged, as against the said bargainees, vendees, grantees, lessees, and every of them, their heirs, successors, executors, administrators, and assigns, and as against all and every person and persons who shall or may lawfully lay claim by, through, from, or under them, or any of them, shall be deemed, taken, and adjudged to be void and of none effect.

The statute of Tennessee, like that of some other states, combines in the same section provisions of both 13th and 27th Elizabeth. It is, so far as purchasers are concerned, as follows:—

§ 1759. Every gift, grant, conveyance of lands, tenements, hereditaments, goods, or chattels; or of any rent, common, or profit out of the same, by writing or otherwise; and every bond, suit, judgment, or execution,—had or made and contrived, of malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures; or to defraud or deceive those who shall purchase the same lands, tenements, or hereditaments, or any rent, profit, or commodity out of them,—shall be deemed and taken only as against the person, his heirs, successors, executors, administrators, and assigns, whose debts, suits, demands, estates, or interests, by such guileful and covinous practices as aforesaid, shall or might be in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary, notwithstanding.

But the New York legislation, in the matter of purchasers as in the matter of creditors, has had a larger following than any other. The statutes make the following provisions:—

(1).¹ § 1. Every conveyance of any estate or interest in

¹ Numbered here for convenience of reference below.

lands, or the rents and profits of lands, and every charge upon lands, or upon the rents and profits thereof made or created, with the intent to defraud prior or subsequent purchasers, for a valuable consideration, of the same lands, rents, or profits, as against such purchasers, shall be void.

§ 2. No such conveyance or charge shall be deemed fraudulent in favor of a subsequent purchaser who shall have actual or legal notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance, or person to be benefited by such charge, was privy to the fraud intended.

§ 3. Every conveyance or charge of or upon any estate or interest in lands containing any provision for the revocation, determination, or alteration of such estate or interest, or any part thereof, at the will of the grantor, shall be void as against subsequent purchasers from such grantor for a valuable consideration, of any estate or interest so liable to be revoked or determined, although the same be not expressly revoked, determined, or altered by such grantor by virtue of the power reserved or expressed in such prior conveyance or charge.

Another title under the same chapter of the New York statutes provides for purchasers (as well as creditors) of *goods*. The following is the text:—

(2). § 5. Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against creditors or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in

good faith, and without any intent to defraud such creditors or purchasers.

(3). It is provided in substance by the next title of the same chapter that every conveyance, charge, instrument, or proceeding declared to be void shall be void against the heirs, successors, personal representatives, or assignees of such creditors or purchasers; also that the question of fraudulent intent shall be one of fact and not of law, and that no conveyance or charge shall be adjudged fraudulent solely on the ground that it was not founded on a valuable consideration. This provision then follows:—

(4). § 5. The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

The laws of the year 1833, of the same state, contain the following:—

(5). § 1. Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against creditors of the mortgagor and subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the succeeding section of this Act.

Of the first of these five statutes, as for convenience the foregoing provisions may be called, the whole is adopted in terms in Colorado, Indiana (with verbal modifications), Michigan, Minnesota, Nebraska, Oregon, Wisconsin, and probably in the newest of the states. The second statute is adopted with the modification that the presumption from retaining possession shall be conclusive, in Colorado; it is adopted

without modification in Indiana, Michigan, Minnesota, Nebraska; and in effect both statutes are an expression of the law everywhere except that in some states the presumption in the second one is conclusive. The third of the statutes has a considerable following; and the fourth and fifth, in one form or another, find a place in the law of all the states.

It comes then to this, that the American law condemns all and all manner of alienation of lands, alike to volunteers and to purchasers for value with notice, made with intent to defraud subsequent, and in many states also prior, purchasers for value without notice; that in many states it condemns all and all manner of alienation of lands with power of revocation, against subsequent purchasers for value;¹ that sales of goods with retention of possession thereafter by the vendor are presumptively, and in some states absolutely, fraudulent against subsequent purchasers for value without notice; and that mortgages, and the like, of goods, without delivery to and continued possession by the mortgagee, are fraudulent against subsequent purchasers and mortgagees for value, unless they are recorded or filed for record according to law.

The English statute will now be examined in a similar, though necessarily briefer, way to that adopted in considering the statute of 13th Elizabeth (after our chapter 4); the subjects for examination accordingly being (1) the modes of alienation, (2) what the statute embraces, (3) whom it protects, (4) against what it affords protection, (5) the saving.

¹ In about half the states there is no such statutory provision; but in some of them it is probably a matter of the common law.

CHAPTER XXI.

CONSTRUCTION OF THE STATUTE.

§ 1. MODES OF ALIENATION.

THE statute of 27th Elizabeth is aimed at far less subtle practices than that of 13th Elizabeth. Every device within the wit or cunning of man is resorted to by debtors not troubled with scruples of honesty to keep their property out of reach of their creditors; and the statute had to be framed and has had to be construed accordingly. There is far less temptation to defeat purchasers in the way which the later statute of Elizabeth seeks to prevent; and as for special devices there are none beyond the making of false recitals on the face of the deeds. The consequence is that the words used by the statute 'fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses,' express everything aimed against and need little if any enlargement or construction. For convenience the term 'alienation' will often be used to express all the modes of conveyance of the statute; the term which was used for a like purpose in regard to the other statute.

§ 2. WHAT THE STATUTE EMBRACES.

Unlike the statute of 13th Elizabeth, the present statute embraces only lands and interests therein. It does not embrace pure chattels;¹ though it does embrace chattel interests in lands, specifying as it does 'every conveyance, grant, charge,

¹ *Bill v. Cureton*, 2 Mylne & K. 503, whether a voluntary settlement or alienation of personalty will defeat or delay creditors; *Jones v. Croucher*, 1 Sim. & S. 315, same. The only question then is,

lease, estate, incumbrance,¹ and limitation of use' in or out of lands, tenements, or hereditaments. Whether the statute applies to conveyances made to charities is a question which has been raised but appears not to have been decided.² It applies to the estates of married women;³ it applies to copyholds;⁴ and it applies to alienations for value as well as to voluntary alienations.⁵

The statute of 27th Elizabeth embraces not only estates actually owned by the person who has now conveyed them in fraud of a purchaser, it embraces, in equity, as well estates which he has contracted to buy, and has bought, for a third person. A case⁶ before Vice Chancellor Wood, afterwards Lord Hatherley, affords an illustration. V having contracted to buy an estate for his wife and children, caused the conveyance to be made to trustees, and trusts to be declared, by deeds which recited the agreement for purchase, and that the conveyance was by V's direction, and declared the trusts to be for the sale of the property and retaining the proceeds for his wife and children. Afterwards V mortgages all his real and personal estate. It was argued (1) that this was not a grant or settlement of land by V, because V had not been owner of the property, and (2) that the subsequent mortgage was not a conveyance of the 'same' lands, so as to bring the case within the statute; it was in effect nothing more than giving the money to the wife and children and enabling *them* to pur-

¹ It was argued in *Clapp v. Leatherbee*, 18 Pick. 131, that mortgages of lands, being personalty for administration, must be regarded as without the statute, when they were in the hands of an administrator; but the court held the contrary.

² *Newcastle v. Attorney Gen.* 12 Clark & F. 402. See *Try v. Gloucester*, 14 Beav. 173; 2 Sugden, Vendors, 719, 8th Am. ed.; 2 Dart, Vendors, 815, 816, 4th Eng. ed.

³ *Currie v. Nind*, 2 Mylne & C. 17; *Goodright d. Humphreys v. Moses*, 2 W. Black. 1019; *Shurmur v. Sedgwick*, 24 Ch. D. 597.

⁴ *Currie v. Nind*, *supra*; *Underwood v. Hitchcox*, 1 Ves. 279, *infra*, p. 535; *Doe d. Tunstill v. Bottriell*, 5 Barn. & Ad. 131.

⁵ *Perry-Herrick v. Attwood*, 2 De G. & J. 21, Lord Cranworth.

⁶ *Barton v. Vanheythuysen*, 11 Hare, 126.

chase. But the court refused to accept this view; V had agreed to buy the estate, and had thereby acquired an equitable interest in it, and the conveyance was a conveyance of his equitable interest.¹

The statute then embraces equitable as well as legal estates. It would follow that if a person under contract to buy lands should assign the benefit to a volunteer, and thereafter should mortgage his equity for value, there would be a case, in equity, for the operation of the statute in favor of the mortgagee. In like manner an equitable mortgagee by deposit of title deeds is within the protection of the statute, against a voluntary grantee of the estate.² And one who has for value contracted to buy the estate already conveyed to a volunteer would be protected; equity would decree specific performance at his suit.³ But it has been held that at law an equitable owner or mortgagee is not to be regarded as a purchaser, and hence that in a legal action, such as trover for title deeds by the trustees of a voluntary settlement against mortgagees by deposit of the deeds, the legal owner under the voluntary conveyance will prevail.⁴ Whether that would be true in England since the Judicature Act does not appear.

§ 3. WHOM THE STATUTE PROTECTS: THE DECLARATORY SECTION.

The statute of 27th Elizabeth, both in the declaratory section and in the saving,⁵ is directed to the protection of pur-

¹ The point was also made that the language of the mortgage was too general to embrace the estates of the settlement, not specified therein; but the court held the contrary.

² Shadwell, V. C. in *Leslie v. Turner*, 5 Hare, 281, 291: '*Buckle v. Mitchell*, 18 Ves. 100, is a direct authority for the proposition that an equitable interest in law entitles a purchaser by contract [that is, one under

contract of purchase] to clothe it with the legal title. By that case I consider myself bound, and that will entitle the plaintiff to avoid the deeds of the 16th of June, 1841, and to enforce his security.'

³ *Buckle v. Mitchell*, *supra*.

⁴ *Kerrison v. Dorrien*, 9 Bing. 76.

⁵ By the 'declaratory section' of the statute is here meant § 2; by the 'saving,' § 4.

chasers. But there is sufficient in the recent authorities to suggest that the declaratory section and the saving should not be treated together, without discrimination, as having the same meaning in regard to purchasers.¹ There is much, it is true, that cannot but be common to the two parts of the statute in that particular. Thus what is necessary to constitute a purchaser, as regards the meaning of that term in itself, is doubtless the same in both parts; mortgagees e. g. are purchasers both in the declaratory section and in the saving;² judgment creditors are not purchasers in either.³ And again he who is a purchaser for valuable consideration under the declaratory section is a purchaser for valuable consideration under the saving; but the converse of this it would not be safe to state, and that is one and the chief reason for separating the two portions of the statute.

In one particular indeed the declaratory section of the statute stands quite by itself, in the nature of things; and that is in regard to the question whether or not 'purchaser' is limited to one who takes directly from the same person who made the prior, impeached alienation. In regard to that the courts at first and for a long time appear to have answered the question in the negative; or rather such an answer was supposed to have been given at first, and then that view was

¹ As to purchasers under the saving see § 5.

² *Senhouse v. Earle*, 1 Amb. 285; *Lloyd v. Attwood*, 3 De G. & J. 614; *In re Barker*, 44 L. J. Ch. 487; *Clarke v. Wright*, 6 Hurl. & N. 849; s. c. 5 Hurl. & N. 401; *Shurmur v. Sedgwick*, 24 Ch. D. 597; *Martin v. Martin*, 2 Russ. & M. 507; *Barton v. Vanheythuysen*, 11 Hare, 126; *Campbell v. Janson*, 11 Ch. D. 1; *Dolphin v. Aylward*, L. R. 4 H. L. 486.

³ *Dolphin v. Aylward*, *supra*; *Beavan v. Oxford*, 6 De G. M. & G. 507; *Kinderley v. Jervis*, 22 Beav. 1; *Evans v. Evans*, 2 Ir. Ch. 242; *Langton v.*

Horton, 1 Hare, 549; *Abbott v. Stratton*, 3 Jones & L. 603; *Brearclyff v. Dorrington*, 4 De G. & S. 122; *Dunster v. Glengall*, 3 Ir. Ch. 47; *Pickering v. Ilfracombe Ry. Co.* L. R. 2 C. P. 235, 248, 251 (doubting *Watts v. Porter*, 2 El. & B. 743); *Whitworth v. Gangain*, 3 Hare, 416; affirmed 1 Phil. 728; *First National Bank v. Hughes*, 10 Mo. App. 7, 16; *Devoe v. Brandt*, 53 N. Y. 462. Some early cases are denied in *Beavan v. Oxford*, *supra*. Further see *Croft v. Lumley*, 6 H. L. Cas. 672; *McAuley v. Clarendon*, 3 Ir. Ch. 568. See also chapter 18, § 12.

followed; and so others than purchasers from the one who made the impeached estate were permitted to have the benefit of the statute. The first resolution of a much quoted case,¹ of the time of Sir Edward Coke as Attorney General was to this effect: If a father makes a lease by fraud and covin of his land, to defraud others to whom he is to demise or sell it, and before the father sells or demises it he dies; and his son, knowing or not knowing of the said lease, sells the land upon good (valuable) consideration, in that case the buyer shall avoid the lease by the said act (i. e. by the purchase). And the resolution went on to declare specifically that it was not necessary that he who sold the land should have made the former estate or incumbrance; if the prior estate were fraudulent, the purchaser should avoid it whosoever made it; 'and therefore in the case at bar the said leases being, on the evidence, thought fraudulent, the vendee of the father and heir shall avoid them.'

This case appears to have been understood until comparatively recent times to have declared broadly that the purchaser need not have taken from him who made the prior alienation.² But an examination of the facts shows, as the resolution itself suggests, that it was a case of personal fraud in the father, and that he made both alienations. The case in substance was this: The father, having by demise from his ancestor an estate for 1,000 years, assigns the lease to his son, then an infant, that it might not be merged by descent of the reversion, the assignment being with colorable intent that the infant should pay debts. On the death of the ancestor the father enters and takes the profits; the son doing nothing under the assignment. Later the *father* sells the land in fee for valuable consideration; and it is now held that the purchaser may

¹ Burrel's Case, 6 Coke, 72.

Dru. & Wal. 397 (1838); Clapp v. Leath-

² Clerk v. Rutland, Lane, 113 (1612); Warburton v. Loveland, 2 Dow & C. 480, 487 (1832); Jones v. Whittaker, Longf. & T. 141 (1841); Blake v. Hyland, 2

erbee, 18 Pick. 131, 138 (1836). And see Doe d. Richards v. Lewis, 11 C. B. 1035 (1852); Doe d. Newman v. Rusham, 17 Q. B. 723 (1852).

avoid the assignment of the lease by the father. It will be seen that the assignment was clearly fraudulent in purpose, and therefore invalid against the purchaser, so that the lease and the reversion (descended) merged in the father; and the whole therefore went to the purchaser.

The declaration therefore that the person who sells need not be the person who made the prior estate was extrajudicial; and though it has been followed or referred to with approval in England, Ireland, and America,¹ more recent English authority has pointed out the real meaning of the case, to wit, that in cases of personal fraud only can it be properly held that the later estate may be made by another than the person who made the one now impeached.² In the case just cited, which was an ejectment, it appeared that A covenanted, by voluntary deed, to stand seised to himself for life, remainder to B for life, remainder to C, lessor of the plaintiff, in fee. A makes his will, devising the premises to B for life, remainder to D in fee; A dies, and B and D convey the premises for value to the defendant. It was held that the defendant was not a purchaser within the meaning of the statute; it was only where the grantor in the voluntary conveyance afterwards sells that the prior alienation is avoided.

The case was very conclusively put by Lord Campbell (for the court). When A, his lordship in effect said, made his will, he had no estate which he could devise, for he had already conveyed it to the lessor of the plaintiff, and if his devisee D took nothing under the will, 'how is it possible that by selling to the defendant he [D] could convey anything to him?'³ Where the same person was grantor in the two alienations, it was right under the statute to say that the

¹ Cases in note 2, supra.

² Doe d. Newman v. Rusham, 17 Q. B. 723.

³ Lewis v. Rees, 3 Kay & J. 132;

Doe d. Richards v. Lewis, 11 C. B. 1035; Parker v. Carter, 4 Hare, 400, 410.

grantor remained owner, towards a purchaser, after his voluntary alienation, so that he could afterwards make a good estate; but the statute did not give such a right to a holder under him. The case would be different under Registry Acts which provide that a subsequent registered deed shall be preferred to a prior unregistered one;¹ but this is an indirect modification of the statute of 27th Elizabeth.

Thus far of what is in itself peculiar to the declaratory section. Next in regard to the matter of value. The statute, like that of 13th Elizabeth, everywhere speaks of purchasers with 'good' consideration; but as in the case of the earlier statute 'good' is always construed to mean 'valuable.' And speaking of the declaratory section of the statute, there is no reason to doubt that what is necessary to constitute valuable consideration under the statute of 13th Elizabeth would be necessary to constitute such consideration under that section of the statute of 27th Elizabeth. It is not quite clear however whether what would be *sufficient* to constitute a valuable consideration under the former statute would always be sufficient under the latter; for the 'purchaser' under the 27th of Elizabeth is seeking to overturn what, *inter partes*, was a perfectly proper and just estate when it was made, and the purchaser too is usually a purchaser with notice and in fact with actual knowledge of the prior alienation.² But with this caution it is probably safe to refer to what has been said in chapter 18, in regard to purchase for valuable consideration, for the meaning of the same expression in the declaratory section (but not in the saving) of the present statute.

The declaratory section of the statute does not add the expression 'bona fide' to purchase for 'good consideration,' as

¹ Warburton v. Loveland, 2 Dow & C. 480, 502; Blake v. Hyland, 2 Dru. & Wal. 397; Doe d. Newman v. Rusham, 723, 735.

² It is probable that there is no distinction; but caution is everywhere particularly necessary in dealing with the present statute in advance of the courts.

does the saving in this (and also in the earlier) statute. But construction has virtually put it there, in a limited way. It makes no difference in England, as will be seen later, that a purchaser for valuable consideration takes with notice or even knowledge of a prior voluntary conveyance; one may even purchase in safety with express purpose to overturn a fair (voluntary) settlement long since made. 'Bona fide' or 'in good faith' then, as construed into the declaratory section, must be taken in a restricted sense; and that sense appears to be this: (1) The subsequent purchaser must have really parted with valuable consideration. (2) If the prior alienation was itself for value, the term 'bona fide' touching the subsequent purchase ordinarily means 'without notice;' perhaps it has other meanings. (3) In each of the two cases just stated the question of adequacy of the consideration has, it seems, a bearing upon the question of purchase in good faith, in the sense of real as opposed to fictitious purchase.¹

In regard to the first case little need be said; for everything is implied in the statement already made, that the purchase must be for value. If it is not, the case is then a question of volunteers; and 'qui prior in tempore prior in jure.' Nor will any recitals or statements of consideration however specific make a case for the purchaser; between the parties there could be no disputing of value, but against a third person the purchaser must establish his case by facts, not by 'evidence' of his own making.² The case would be different where the plaintiff (or the defendant for that matter) is attacking instead of maintaining a deed; in such

¹ The term 'bona fide' is indeed one of the most inexact terms of the law. Sometimes, and perhaps more generally, it means 'without notice,' sometimes 'in due course of trade,' sometimes (see *Ricker v. Ham*, 14 Mass. 137, 141) 'not fictitious;' and it may have still other meanings. And it is possible that in a case under the declaratory sec-

tion of 27 Eliz. inadequacy, when great enough to have any effect, may be treated as a thing apart, without being referred to want of good faith, as in ordinary cases it appears to be. Still it seems more natural to refer it to bad faith.

² Ante, p. 443, note.

a case the burden would be upon the person making the attack.¹

In regard to the second case, we have for consideration two purchases for value; of which the first must prevail, under the language of the saving and also under the maxim above quoted, unless the second was made without notice. There cannot be two successive purchases from the same person of the legal estate; one of the two purchases must have been of an equitable estate, and the purchase of the legal estate for value without notice will prevail. If then the former estate, though purchased for value, is equitable and the second legal, the latter will prevail; if both were equitable, 'qui prior in tempore prior in jure,' unless possibly it appear that the second equitable purchaser had no notice of the prior equity.² If the former estate was legal, the second must be equitable, and the former, being for value, must prevail both at law and in equity.

The third case applies to both the preceding cases; it is the case of an attacking purchaser whose purchase was effected by an inadequate consideration. Unless the recent authorities touching the saving of the statute, that is, touching what constitutes a sufficient consideration in the case of a prior conveyance as e. g. a settlement,—unless these authorities have overruled those which proceeded upon the *declaratory* section of the statute, inadequacy in the purchase may be so great as to show bad faith and thus prevent the purchaser from overturning the prior voluntary estate. In a case³ often cited Lord Eldon, following Lord Mansfield,⁴ said that if the subsequent estate in question was purchased 'at a third part

¹ See *Humphreys v. Pensam*, 1 Mylne & C. 580; *Scott v. Scott*, 4 H. L. Cas. 1065, 1086.

² See a case of *French v. Hope*, Pump Court, vol. 4, p. 158, coram Kekewich, J. apparently denying *Parker v. Clarke*, 30 Beav. 54, which states the old and

generally declared rule. As to that rule see an article in 1 Harv. L. Rev. 1.

³ *Metcalf v. Pulvertoft*, 1 Ves. & B. 180.

⁴ *Doe d. Watson v. Routledge*, 2 Cowp. 705, denied on *another* point in *Doe d. Otley v. Manning*, 9 East, 59.

of its value' the purchaser could not prevail over the voluntary settlement.¹ And so again where the prior estate, although purchased for value, was not the legal estate, the subsequent purchase may have been made for such inadequacy as to show bad faith, thus preventing the purchaser, as before, from succeeding.

§ 4. AGAINST WHAT THE STATUTE GIVES PROTECTION: 'PURPOSE AND INTENT TO DECEIVE.'

The language of the statute of 27th Elizabeth differs slightly from that of the 13th Elizabeth, on the point of fraud. The preamble of the statute of 27th Elizabeth speaks of alienations 'meant or intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased or shall purchase the same, or else by the secret intent of the parties the same to be to their own proper use;' and then for remedy 'of such fraudulent, feigned, and covinous conveyances' the enactment is made.

The language of the preamble, which for convenience may be abridged to 'purpose and intent to deceive,' taken with the object of the whole statute, for a long time appears to have given trouble to the courts. It was seen from the first that it would be fatal to what was to be accomplished by the law if 'purpose and intent to deceive' should be taken in the ordinary popular sense; and accordingly, from the first, that sense was rejected, and from the same moment the words became words of art, though of inexact sense. It took more than two centuries to fix finally their meaning, the only thing thereto-

¹ See also *Doe d. Parry v. James*, 16 East, 212; *Doe d. Sweetland v. Webber*, 1 Ad. & E. 733, 742.

In suits for specific performance inadequacy on the plaintiff's side is a well-known bar to recovery. A agrees by articles to sell copyholds to B, who for inadequate consideration agrees to

sell the same to C. A now surrenders the lands to B on limitations, differing from the terms of the articles, to A and wife, and the heirs of their bodies, remainder to A in fee. C now prays for specific performance, which is refused for inadequacy. *Underwood v. Hitchcox*, 1 Ves. 279.

fore agreed being that the words must not be understood to mean intent in the mind to defraud. Before the decision of a famous case¹ in the time of Lord Ellenborough, to be stated presently, the courts had fluctuated somewhat between holding that a voluntary alienation of an estate followed by an alienation of it to another for valuable consideration was absolutely fraudulent or only *prima facie* fraudulent, in contemplation of law.² This, it should be observed, was the state of things at the time of the separation of this country from Great Britain.³

In this state of things the case⁴ referred to went before Lord Ellenborough and the other judges of the King's Bench,

¹ Doe d. Otley v. Manning, 9 East, 59 (1807).

² Among the decisions treating the case as one of absolute fraud see Woodie's Case, cited in Colville v. Parker, Cro. Jac. 158 (1608); White v. Hussey, Prec. Ch. 14 (1690); Gardiner v. Painter, Cas. t. King, 65 (1726); Tonkins v. Ennis, 1 Eq. Cas. Abr. 334 (1727); White v. Sansom, 3 Atk. 412 (1746); Townshend v. Windham, 2 Ves. 10 (1750). Among those treating it as only *prima facie* evidence of fraud see Bovy's Case, Ventr. 193 (1672); Jenkins v. Kemishe, or Keymis, Hard. 398; s. c. 1 Lev. 150 (1665); Lavender v. Blackstone, 2 Lev. 146 (1676); Garth v. Mois, 1 Keb. 486 (1664); Style, 446; Doe d. Watson v. Routledge, 2 Cowp. 705 (1777). Some other cases on both sides are mentioned by Lord Ellenborough in Doe d. Otley v. Manning, *supra*.

In Woodie's Case, *supra*, it was held that an assignment of a lease of lands, by one quasi in jointure, to his wife, he taking the profits and afterwards selling it without notice, was within the statute, though not made in trust to be revoked, nor with any clause of revocation; because it was a voluntary con-

veyance at first, and should be intended fraudulent at the beginning.

So in Townshend v. Windham, *supra*, Lord Hardwicke said: 'On the 27th of Elizabeth every voluntary conveyance made, when afterwards there is a subsequent [sic] conveyance made for valuable consideration, though no fraud in that voluntary conveyance, nor the person making it at all indebted, yet the determinations are that such mere voluntary conveyance is void at law by the subsequent purchase for valuable consideration.'

On the other hand it had been said by Lord Hale in Bovy's Case, *supra*, that 'though every voluntary conveyance carries an evidence of fraud, yet it is not upon that account only always to be reckoned fraudulent or to be avoided by a purchaser for a valuable consideration.' And in the case in Style Lord Rolle, going still further, said that 'a voluntary conveyance upon consideration of natural affection hath no badge of fraud unless he who makes it be indebted at the time or in treaty for the sale of the lands.'

³ Cathcart v. Robinson, 5 Peters, 263.

⁴ Doe d. Otley v. Manning, 9 East, 59.

in the year 1807, for decision. The action was ejectment, by a purchaser for valuable consideration, with notice, of lands which had before been made the subject of a voluntary settlement by the same grantors, but without any fraudulent purpose as a matter of fact. The plaintiff prevailed; Lord Ellenborough declaring, upon a review of the authorities, that the weight of authority, and the better view as well, gave the case to the plaintiff. The law, it was now declared, 'presumed fraud without admitting such presumption to be contradicted;' and it was deemed 'more fit, upon the whole, that a voluntary grantee should be disappointed than that a fair purchaser should be defrauded.' This decision has never since been departed from.¹

The reason for laying such stress upon the legal effect of a voluntary conveyance followed by a conveyance for value is found in the fact that the plaintiff was a purchaser with notice, and that many estates had been made in the same way; it was now deemed undesirable to unsettle such dispositions,² and it was therefore deemed necessary to hold that the notice under which the purchase for value was made was notice of an absolutely fraudulent transaction and hence was of no effect.³ This however was not without an expression of regret

¹ *Daking v. Whimper*, 26 Beav. 568; *Doe d. Newman v. Rusham*, 17 Q. B. 723; *Trowell v. Shenton*, 8 Ch. D. 318; *Ex parte Hillman*, 10 Ch. D. 622; *Dolphin v. Aylward*, L. R. 4 H. L. 486; *Mackie v. Haberton*, 9 App. Cas. 337; *Mullins v. Guilfoyle*, 2 L. R. Ir. 95; *Lee v. Mathews*, 6 L. R. Ir. 530.

² *Evelyn v. Templar*, 2 Bro. C. C. 148 (1787). Lord Thurlow: 'Although it would have been as well at first if the voluntary settlement had not been thought so little of, yet the rule was such, and so many estates stand upon it that it cannot be shaken.' See also *Buckle v. Mitchell*, 18 Ves. 100 (1812). Sir Wm. Grant: 'I have great diffi-

culty to persuade myself that the words of the statute warranted or that the purpose of it required such a construction. . . . But it is essential to the security of property that the rule should be adhered to when settled.'

³ It had so been held before. *Senhouse v. Earle*, 1 Amb. 285, Lord Hardwicke; *Evelyn v. Templar*, *supra*.

In *Evelyn v. Templar* a voluntary settlor had in the settlement reserved a power of sale, but had covenanted that the purchase-money should be paid to the trustees of the settlement. With notice of this covenant a purchaser paid his money to the settlor, who died insolvent. On a bill by his

on the part of Lord Ellenborough, which many other judges, English and American, have repeated.¹

And lest the rule itself might have a dangerous tendency, lest it might tend to unsettle the fundamental doctrine that fraud must be found in the act which is declared fraudulent, and that an innocent act could not afterwards, retroactively, be made fraudulent by a transaction in no way connected with it;—to prevent any such inference the decision by Lord Ellenborough has been explained, in accordance with his lordship's own intimation, by a fiction. And that is to this effect: By selling the property afterwards for value, the seller so entirely repudiates the former voluntary alienation, and shows his intention to sell, that it shall be taken conclusively against him and the first grantee that such intention existed when he made the first estate, and that it was made in order to defeat the purchaser.²

children claiming under the settlement it was held that there had been no misapplication of the purchase-money, because the settlement was fraudulent as to the purchaser. That is, the volunteers have no equity in the purchase-money. *Daking v. Whimper*, 26 Beav. 568; *In re Walhampton*, 26 Ch. D. 391.

¹ *Pulvertoft v. Pulvertoft*, 18 Ves. 84, Lord Eldon; *Buckle v. Mitchell*, ib. 100, Sir Wm. Grant; *Doe d. Newman v. Rusham*, 17 Q. B. 723, Lord Campbell; *Bayspoole v. Collins*, L. R. 6 Ch. 228, Lord Hatherley; *Rosher v. Williams*, L. R. 20 Eq. 210, Malins, V. C.; *Ex parte Hillman*, 10 Ch. D. 622, Jessel, M. R.; *Sterry v. Arden*, 1 Johns. Ch. 261, Chancellor Kent; s. c. 12 Johns. 536; *Cathcart v. Robinson*, 5 Peters, 263, Chief Justice Marshall; and other cases. See also the earlier case of *Doe d. Bothell v. Martyr*, 1 Bos. & P. N. R. 332.

² Lord Campbell, C. J. in *Doe d. Newman v. Rusham*, 17 Q. B. 723;

In re Barker, 44 L. J. Ch. 487, Jessel, M. R.; *Doe d. Otley v. Manning*, 9 East, 59 (where Lord Ellenborough said that 'it was a just presumption of law that such voluntary conveyance . . . if coupled with a subsequent sale, was meant to defraud those who should afterwards become purchasers for a valuable consideration'); *Evelyn v. Templar*, 2 Bro. C. C. 148; *Cathcart v. Robinson*, 5 Peters, 263, Marshall, C. J.

Jessel, M. R.: 'The doctrine being that, however honest, as this was (for in truth it was an attempt to repair the consequences of a dishonest act, by the person who had committed it), yet in contemplation of law the person who has executed the voluntary deed, and at any time afterwards conveys away the estate, although he gives notice to the purchaser of the voluntary deed, is presumed to have had in his mind, at the time of executing the voluntary deed, a fraudulent intent, that is, an intent to cheat the purchaser who

This fiction appears indeed to be an attempt to explain the words of the statute in accordance with the popular meaning of the word 'fraud;' but the answer to that suggestion is given by what the courts have uniformly done. They have from the first refused to hear evidence of want of any personal intention to defraud; and that too as well when holding, in earlier times, that the making a voluntary conveyance was presumptive evidence of fraud as since the time of Lord Ellenborough, for the very object of the presumption was to prevent the grantor and the grantee in the voluntary alienation from showing the absence of any intention to defraud. In almost every case the fact, if admissible, could be shown; and the statute would be defeated.¹ The conveyance, if it was to stand, must be explained and made good in some other way. In view of all this it would seem to be the better way to say directly, what is true, that the words of the statute are words of art; then it will not be necessary to find intention where intention is not.²

But the case may well be explained upon the actual facts

bought the estate afterwards with notice of the voluntary deed and of the whole of the transaction.' In *re Barker*, *supra*.

Where there has been personal fraud lapse of time, it has been held, will not bar a purchaser with notice. *Alden v. Gregory*, 2 Eden, 280. Lord Northington: 'The next question is, whether delay will purge a fraud. Never, while I sit here.' See *Whalley v. Whalley*, 1 Mer. 436.

¹ Even of anything short of the absolute presumption Lord Ellenborough says that 'a different construction would have so narrowed the operation of the statute as to leave the persons meant to be protected by it subject to almost all the mischiefs intended to be guarded against.' *Doe d. Otley v. Manning*, 9 East, 59.

Referring to some of the early cases in which conveyances had been decided, 'on evidence given at the bar,' to be fraudulent, or in which the jury had been directed on evidence, Lord Ellenborough in *Doe v. Manning* says: 'They are not inconsistent with the possibility of juries having been directed what ought to be their *conclusion in point of law*, from the facts given in evidence, if the jury should find them to be true; *for fraud and covin is always a question of law*; it is *the judgment of law on facts and intents*.' The italics are Lord Ellenborough's. And similar language has been used by an able American judge, Chief Justice Ruffin, in *Gregory v. Perkins*, 4 Dev. 50, 53, ante, p. 262, note.

² Further see chapter 15.

as consistent with the fundamental idea of fraud; the voluntary conveyance was under the circumstances, towards third persons, deceptive if not fictitious; the settlor has continued in the enjoyment and exercise (not of possession merely, for that would not be enough in a matter of land, but of) ownership; it might be said of him as was said of a feoffor in a case¹ heretofore mentioned, 'he continually took the profits of the lands contained in the deed;' he has presumably retained the title deeds; and finally as owner, with the title deeds in his hands, he has assumed to sell the estate. That makes a case of fraud in a very common form,² whether it be treated as an absolute or only (as in this country) as a *prima facie* case. The resort to relation is unnecessary; there may have been no personal intention to defraud, but there was what would or might have been such intention in the average man. The real difficulty is in declaring that notice shall not affect the subsequent purchaser.³

So strong however is the position of the buyer that equity itself will aid him against the volunteer, notwithstanding the fact of notice; equity will still give specific performance at the instance of one who for value has contracted to buy the estate voluntarily conveyed.⁴ Nor indeed will equity put anything in the way of the *seller's* execution of his contract to convey. In a leading case⁵ before Lord Eldon the wife of the vendor, in whose favor the vendor had made a fair though voluntary provision out of his lands, sought afterwards to have her husband restrained from selling the estate to a purchaser for value with notice, and failed.⁶

¹ Dyer, 294 b, ante, pp. 143, 144, note. Clarke v. Willott, L. R. 7 Ex. 313; Peter v. Nicoll, L. R. 11 Eq. 391;

² Comp. ante, p. 210. Drew v. Martin, 1 Hem. & M. 130.

³ See the language of Sir Wm. Grant in Buckle v. Mitchell, 18 Ves. 100.

⁵ Pulvertoft v. Pulvertoft, supra.

⁴ Pulvertoft v. Pulvertoft, 18 Ves. 84; Smith v. Garland, 2 Mer. 123; ⁶ Lord Eldon at first granted the injunction, but immediately 'felt very uneasy, as having taken a step that

But equity will not further encourage the double-vendor; it will not decree specific performance, in *his* of a contract to buy the estate, unless indeed the buyer declares that he is willing to complete the contract if title can be made.¹ The main proposition was decided in *Case*² before Sir Wm. Grant, already cited; 'the Court of Equity remains neutral with respect to' the sale in *this* case. More than this, the contract-buyer is not merely entitled to refuse to complete the purchase, he can so far as to annul the contract because of the voluntary conveyance and recover back a deposit he may have made for binding the bargain.³ In the case cited, which was a suit of that kind, it was held that the defendant could not make a good title because the voluntary conveyance might have been made in the mean time by a consideration operating *ex post facto* so that its invalidity depended upon doubtful facts; and not only because the defendant could not compel the plaintiff to concur with him in defeating the prior conveyance, but in making good the title. The defendant must be able to make a good title without the plaintiff's help.

In this country there was much doubt, and some conflict of authority, before the characteristic legislation noticed in the preceding chapter and the registration laws; which not only put an end to doubts but put an end also, substantially, to litigation under the statute. But before this legislation the Chancellor Kent, and with him the Court of Errors and the state, had declared that the rule established in England

. . . was never before asked from a court of justice.' He therefore discharged the injunction, and took occasion to doubt a case of *Holford v. Holford*, 1 Ch. Cas. 216. If that case, the Lord Chancellor said, 'was a decision that this court will not execute articles against a voluntary settlement, it contradicts a much later case in Dickens. [*Parry v. Carwarden*, 2 Dick. 544]

and others, where this court has executed articles against a voluntary settlement.

¹ *Peter v. Nicolls*, L. R. 11 Eq. Stuart, V. C. : 'The decision in *v. Garland* applies only to the case of an unwilling purchaser.'

² *Smith v. Garland*, 2 Mer. 122.

³ *Clarke v. Willott*, L. R. 10 Ch. 313.

⁴ *Ante*, pp. 466 et seq.

Lord Ellenborough was to be regarded as the rule which, by the weight of authority, already prevailed in England at the beginning of the American revolution, and therefore was the rule in this country.¹ This was in the year 1814. A like opinion was expressed in the year 1821 by Mr. Justice Washington in the Circuit Court of the United States for Pennsylvania,² and by the Supreme Court of Massachusetts fifteen years later.³

The question however went to the Supreme Court of the United States, in a case⁴ already cited, in the year 1831; a case which arose in the District of Columbia, where the statute of 27th Elizabeth was common law. In that case Chief Justice Marshall, speaking for the court, took the view that at the time of the separation of the colonies the law of England was not settled; and the court considered that the doctrine that a voluntary conveyance was to be deemed absolutely fraudulent against a subsequent conveyance of the estate for value went beyond the construction which prevailed at the beginning of the revolution. But it was declared that the universally received doctrine of that time in England had gone as far as this; that a subsequent sale, without notice, by one who had made a voluntary settlement of the same estate was presumptive evidence of fraud, and that doctrine was now followed. It is apprehended that that expresses the view of the profession generally in this country at the present time, so far as attention is ever directed to the subject.⁵

The rule does not however let in evidence of want of purpose to defraud the purchaser; the presumption is one of policy, raised for the purpose of excluding such evidence.

¹ *Sterry v. Arden*, 1 Johns. Ch. 261; s. c. 12 Johns. 536.

² *Den d. Ridgeway v. Underwood*, 4 Wash. C. C. 129.

³ *Clapp v. Leatherbee*, 18 Pick. 181, 137 (1836). See also *Ricker v. Ham*, 14 Mass. 137 (1817).

⁴ *Cathcart v. Robinson*, 5 Peters, 263.

⁵ The English rule as to the want of effect of notice is denied in *Hudnal v. Wilder*, 4 McCord, 294; *Hunters v. White*, 3 Gratt. 26; *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 491.

Accordingly in the case before Chief Justice Marshall the inquiry whether the presumption should stand or not was not directed to the state of mind of the settlor, but to the circumstances accompanying and following the settlement, which, it may be added, were considered to have confirmed the presumption of law. It is safe to conclude that in this country as well as in England the words 'purpose and intent to deceive,' and the corresponding words in our special legislation, are technical and are not to be understood in the popular sense,¹ except in transactions 'naturally innocent.'²

§ 5. THE SAVING: VALUABLE CONSIDERATION.

This brings us to the saving (contained in section 4) of purchasers for 'good,' i. e. valuable, consideration and 'bona fide.' As we have already remarked, valuable consideration in this part of the statute calls for special examination; towards, and for the protection of, the prior estate, which the purchaser declares was voluntary, the courts have in recent times shown a very marked tenderness. They have shown a disposition to depart somewhat from the meaning attached to 'valuable consideration' under the other statute and from its meaning in general in the law of contracts; this disposition being manifested in the way of extension. There is no sharply defined departure; the case can only be called a disposition to depart.

The reason for this inclination to extend the meaning of the term 'valuable' is found in the rather severe construction, noticed in the preceding section, which the English courts have felt it necessary or desirable to adopt in the construction of the declaratory section of the statute. That section has

¹ In some of our cases the meaning of the court in regard to fraudulent intent in such transactions is left in doubt, though apparently the meaning is that the intent must be personal. Gardner v. Boothe, 31 Ala. 186; Anderson v. Etter, 102 Ind. 115. But if that is the meaning, they are against the current of authority.

² Comp. ante, pp. 383-388.

nothing to say of notice ; nor has any other section which refers to the purchasers designated in that one. And so it is that from the time of Lord Ellenborough it has always been held that notice or knowledge, on the part of the purchaser, of the prior voluntary alienation will not bar his right. It is for this reason that the courts encourage those claiming under the prior estate to lay hold of anything, especially of anything capable of being treated as a valuable consideration, that may help to save them.

There are two or three recent authorities which will serve to show this extension of the meaning of valuable consideration, under the statute of 27th Elizabeth. In these cases the alienee has undertaken to do something upon or in relation to the estate, 'in consideration' of the alienation, where, under the statute of 13th Elizabeth, there would pretty clearly be wanting a valuable consideration.¹ In the first of the cases² to be referred to the court indeed refused to treat the consideration as valuable, but it came near the line and the modern extension of the doctrine was particularly spoken of. There had been a deed of the whole of the grantor's estate, voluntary unless it was for value by reason of a covenant on the part of the grantee to build a house on the land under certain circumstances, and within a certain time, but without any provision for defeasance in case the covenant should not be performed.

Now the very fact that such a case, and this was not the first of the kind,³ could have occupied, as it did occupy, the serious attention of the court shows the pressure of the state of the law relating to this statute ; the case could not have been arguable under the statute of 13th Elizabeth. It was however earnestly argued that the doctrine of valuable consideration had become extended far enough to protect the

¹ Ante, pp. 446-450.

² *Townend v. Toker*, L. R. 1 Ch.

³ *Rosher v. Williams*, L. R. 20 Eq. 446, on authority of which *Rosher v. Williams* was decided.

prior grantee even in such a case; and though the court refused to adopt this view, it was admitted that the doctrine of consideration had been extended under this statute. 'The modern decisions,' said Vice-Chancellor Malins, a very able judge, 'may be considered as having to a considerable extent qualified the old rule of the court.' And this he now emphasized by declaring the rule of law to be as follows: If upon the occasion of executing what is called a voluntary settlement (the meaning of which is there explained) it turns out that, instead of being purely voluntary, any consideration *whatever* was paid or given, or any benefit rendered to the grantor, even such as an agreement to relieve the grantor from the immediate payment of a debt,¹ the court will *anxiously* lay hold of any circumstances constituting a consideration moving from the grantee to the grantor to take the case out of the category of voluntary settlements.² This too was said after comment upon the severity of the construction of the statute in regard to notice.

A case³ often cited was referred to by the court as one of the modern authorities which had extended the rule of law. An aunt had proposed to her nephew that he should take a larger house than the one he was occupying, and that she should come and live with him, she contributing towards the household expenses. The nephew agreed provided that the aunt, who was seised of lands in fee subject to mortgages, would settle her estate in his favor on her death; which she assented to and did; and the nephew covenanted to indemnify her from liability for interest on the mortgages, except for her lifetime. The larger house was accordingly taken, and the aunt came and lived for considerable time with her nephew. Afterwards she left him and agreed to sell the es-

¹ As, he says, in *Bayspoole v. Collins*, L. R. 6 Ch. 228, *supra*. That would not be enough under 13 Eliz. See ante, p. 447, note.

² The italics are the present writer's.

³ *Townend v. Toker*, L. R. 1 Ch. 446.

tate to a purchaser for valuable consideration. It was held, on a bill by the purchaser for specific performance that the settlement was for value, as being founded upon a bargain.¹ But this case would probably be accepted as a general exposition of consideration, for there was no thought of a gift; the transaction was a bargain from beginning to end.²

The next case³ to be referred to is however more conclusive; it is one which, for that reason, has attracted much attention, and has almost always⁴ been treated as a case peculiar to the statute of 27th Elizabeth. In that case the alienation attacked by the purchaser was an assignment of leasehold property, voluntary unless the fact that the assignee assumed the covenants of the lease made it for value; which, according to the current of authority, would not have had such effect under the statute of 13th Elizabeth.⁵ But the Court of Appeal now held that the assignment was for valuable consideration and refused to disturb the transaction. And this decision, though criticised or limited to its own facts,⁶ in cases arising under the other statute, has been distinctly approved in later decisions, by the same court, on the 27th of Elizabeth.⁷

In the case referred to, Sir George Jessel, M. R., who had not been of the court which decided the matter of the assignment of the leasehold estate, now said that the rule that voluntary conveyances were fraudulent against purchasers with

¹ Turner, L. J.: 'The question is, whether the transaction was one of bargain or of gift merely, and I am of opinion that there was consideration for this settlement, and that the case is one of bargain and not of gift merely. The settlement purports to be made in consideration, not of natural love and affection, but of the covenants contained in it on the part of P. C. Toker,' the nephew.

² See ante, pp. 446, 447.

³ Price v. Jenkins, 5 Ch. D. 619; affirming 4 Ch. D. 483.

⁴ There is a single exception in Harris v. Tubb, 42 Ch. D. 79, before a single judge. See ante, p. 446, note.

⁵ See the cases cited ante, p. 446.

⁶ See ante, p. 446, note. Price v. Jenkins was denied in Lee v. Mathews, 6 L. R. Ir. 530, C. A. reversing ib. 167, and Gardiner v. Gardiner, 12 Ir. C. L. 565, followed. Lee v. Mathews arose upon the Irish statute corresponding to 27 Eliz. See also Holmes, Common Law, 293.

⁷ Ex parte Hillman, 10 Ch. D. 622, C. A.

notice was judge-made law, and the judge-made law later decision in question¹ had corrected the former as was then possible. Here now had been an opportunity for the extension of the doctrine of consideration; on the contrary it was approved, but on the ground, it should be observed, that the decision was intended to correct, as far as possible, the construction which had been adopted in relation to the statute of 27th Elizabeth. The Irish courts have refused to make the advance.²

This caution ought then to be observed; to wit, it must not be taken, as yet, that the courts of England have enlarged the whole doctrine of valuable consideration to make that a valuable consideration, which under the statute of 13th Elizabeth, and in contracts generally, has not far been regarded as valuable. The reason for extending the rule has been very urgent in the case of the prior taker under the statute of 27th Elizabeth; in other situations it would work serious mischief to treat the extension as intended to be general.

The same rules will apply for or against the taker under the prior estate in regard to the incidents and modes of creating a valuable consideration as would apply to the subsequent purchaser, or as would apply to a purchaser under the statute of 13th Elizabeth. Thus a postnuptial settlement cannot be connected with a parol antenuptial contract to make the settlement valuable.³ So where the promise was made by an infant, and the postnuptial conveyance was made by him after he came of age; to connect the two, so as to make the conveyance rest upon value, there must have been a ratification.⁴ Again the law requires the same manifest

¹ Price v. Jenkins, *supra*.

C. A., overruling Barkworth v.

² Lee v. Mathews, 6 L. R. Ir. 530, *supra*, p. 546, note.

⁴ Drew. 1; *ante*, p. 134, note.

⁴ Trowell v. Shenton, *supra*.

³ Trowell v. Shenton, 8 Ch. D. 318,

of intention to connect the two transactions, and thus save the prior estate, as would be required for a purchaser under the other statute.¹ The same persons too are within the consideration of a marriage contract under the present statute as under the statute of 13th Elizabeth; indeed it is under the present statute that the discussion of the subject has chiefly taken place.²

It has sometimes happened that a settlement made for valuable consideration has failed by reason of some law of the place where the lands lie, and that afterwards the settlor or settlors have conveyed the lands to another for value; in such a case what are the rights, if any, of those intended by the settlement, especially where the subsequent purchaser has taken with notice? In a case³ before Sir John Leach, M. R. it appeared that a settlement had been made under order of court of a female ward, upon her marriage, for the benefit of herself and the children of the marriage, of lands in Demarara, of which the wife had been seised in fee. The lands were afterwards mortgaged by the husband and wife to one who had notice of the settlement. By the law of Demarara the settlement was a nullity. In a contest with the mortgagee touching the wife's rights it was held that her equity, as being entitled to a settlement such as had been made, was against her husband personally, to claim an equivalent, and did not attach to the estate; the mortgagee was not affected by that equity, and therefore prevailed.

¹ Cracknall v. Janson, 11 Ch. D. 1; In re Barker, 44 L. J. Ch. 487; ante, p. 485.

² The cases of chief importance are Clarke v. Wright, 6 Hurl. & N. 849, Ex. Ch.; s. c. as Dickenson v. Wright, 5 Hurl. & N. 401; Gale v. Gale, 6 Ch. D. 144; Mackie v. Haberton, 9 App. Cas. 337. The last-named case has probably put the doubts on the subject

to rest. The following are some of the earlier cases: Newstead v. Searles, 1 Atk. 265; Clayton v. Wilton, 6 Maule & S. 67, note; Pulvertoft v. Pulvertoft, 18 Ves. 84, 92; Doe d. Baverstock v. Rolfe, 8 Ad. & E. 650; Ford v. Stuart, 15 Beav. 493. The subject is presented ante, pp. 479 et seq.

³ Martin v. Martin, 2 Russ. & M. 507.

Volunteers are never, in any right of their own, within the saving of the statute. They cannot have the grantor restrained from selling;¹ they have no equity to the purchase-money received upon the subsequent sale of the estate, even though the grantor may have covenanted to lay out the same for their benefit.² Indirectly however a volunteer, when associated with a purchaser for value in the alienation, may have, and sometimes even call for, protection. The purchaser for value could have a contract for the sale specifically enforced, and the result would inure to the proper benefit of his volunteer associate.³

And the case cited shows that he may have substantive relief, in a contest with the grantor's heir. In that case a husband and wife had bought lands, the former purchasing for value, the latter being a volunteer. The husband dying before the purchase-price was fully paid, a contest arose between the widow and the heir; the heir claiming the land by descent, the widow claiming it under the purchase and insisting that payment of what still was due should be made out of the husband's personal estate. The decision was in favor of the widow.⁴ Of course the case cited had nothing to do with the statute of 27th Elizabeth; its only significance in that respect lies in the fact that it shows, indirectly, if any authority is needed for the point, that a volunteer associated with a purchaser for value cannot be deprived of the benefit of the estate by a subsequent purchase of the same for value.

¹ *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Smith v. Garland*, 2 Mer. 123. See *infra*, p. 550.

² *Evelyn v. Templar*, 2 Bro. C. C. 148; *Daking v. Whimper*, 26 Beav. 568; *In re Walhampton*, 26 Ch. D. 391. See *infra*, p. 550. The covenanters would have had a right of action against the settlor on his covenant, but he had died insolvent.

³ *Drew v. Martin*, 2 Hem. & M. 130.

⁴ *Wood*, V. C.: 'Although the wife, being a mere volunteer, could not compel specific performance, still the vendors could enforce payment from the husband's estate, and when they had done so, the conveyance would have to be made to the wife surviving.'

But while a volunteer under ordinary circumstances is not within any protection of the statute, still his situation is one which the courts will not permit to be abused. His right to the estate can be disturbed, not as the grantor or the purchaser wills, — far from it; but only in the way and to the extent permitted by the statute. Thus a subsequent mortgage overturns the voluntary alienation only to the extent of what is due; further the mortgagee cannot claim. A settles Blackacre voluntarily, and afterwards mortgages the estate to B. Later A mortgages Whiteacre, and this mortgage also becomes vested in B. The court will not permit B to consolidate the two mortgages against the beneficiaries of the settlement, so as to burden the estate with the second debt.¹

The case just cited affords another illustration of the proposition that the statute does not permit the grantor to disturb the voluntary alienation further than may be necessary for the purposes of the law. After having mortgaged his estates in fee, A settles the same voluntarily to grantees to uses, to hold subject to the mortgage and to a power of raising a sum of money, to his own use for life, with certain remainders. The mortgage contained a power of sale, which the mortgagee afterwards exercised; and, after having satisfaction of his debt out of the money realized, he paid the rest into court. The question now was raised whether the settlor or the persons claiming under the settlement were entitled to the

¹ In *re Walhampton*, 26 Ch. D. 391. Kay, J.: 'It is true that a voluntary settlement is void as against a subsequent mortgagee to the extent of the mortgage. But because that mortgagee afterwards obtains from the mortgagor another security, is he to be allowed to consolidate his two securities so as to throw on the estate subject to the settlement any part of the sum which may be owing to him beyond that originally charged thereon? . . . The statute of Elizabeth gives him no such power. It makes a voluntary settlement fraudulent and void as against a subsequent purchaser, but it only makes it void to the extent of the purchaser's interest therein.'

So where W made a voluntary settlement containing a power of revocation, and afterwards made his will confirming the settlement, and later mortgaged the property, it was held that the mortgage revoked the will and settlement pro tanto only. *Perkins v. Walker*, 1 Vern. 97; *Thorne v. Thorne*, ib. 141.

fund. Had the sale been made by the settlor under authority given to him, it is clear from what has been said, and it was conceded, that the fund would have belonged to the settlor; a volunteer has ordinarily no equity to the purchase-money.¹ And it was argued that this case fell within that rule; the sale had entirely destroyed the settlement; and it must be treated as if it had been made by the settlor. But the court denied this view, treating the proceeds of the sale by the mortgagor as an interest in the hereditaments, and therefore as belonging to the persons entitled under the settlement. The statute of 27th Elizabeth in reality did not apply to such a case; the sale was not by the settlor nor under any power reserved to him.²

§ 6. THE SAVING CONTINUED: GOOD FAITH.

The saving of the 4th section of the statute is in favor not of purchasers for value but of purchasers for value 'and bona fide.' What is the meaning of 'bona fide' in this part of the statute?³ Obviously it does not mean 'without notice,' because in ordinary cases the estate referred to is prior to the

¹ Supra, p. 549.

² Kay, J.: 'But suppose a donor, having nothing but a share of the proceeds of certain real estate which was subject to a power of sale vested in another person, were to grant by deed all his interest in that real estate to a volunteer, and that subsequently the power of sale was exercised. I apprehend that his share of the proceeds would before the sale be correctly described as an interest in the hereditaments, and that such a grant would be perfectly good and valid as between him and the grantee. At the time of making the grant it was as complete a transfer of his interest as he was capable of effecting.'

The learned judge referred to Dolphin

v. Aylward, L. R. 4 H. L. 486, 499, where Lord Cranworth had affirmed the doctrine that a settlor could not invalidate his voluntary deed except by a subsequent disposition by himself for value, and only to the extent of that disposition; and Hales v. Cox, 32 Beav. 118, was mentioned, in which 'that doctrine was carried so far that it was held that persons claiming under such a settlement had a right to marshal the mortgages of the estate under a subsequent mortgage which included other property.' Donaldson v. Donaldson, Kay, 718, and Kekewich v. Manning, 1 De G. M. & G. 176, were also referred to.

³ On the term in general see ante, p. 533, note.

one which is alleged to have overturned it;¹ and if subsequent, we have seen that notice is immaterial. The term appears to refer to either of two classes of cases; first, alienations made, though for value, with an actual view of defeating a subsequent sale; secondly, alienations professedly on valuable consideration, but fictitious in that respect.

Of the first of these cases the books contain but few exemplifications.² The principle however seems clear enough; if an alienation, though for value, is made and taken with a view of defeating a subsequent sale for value, it is right and appears to be within the obvious meaning of the statute, that towards the subsequent buyer it should be of no force. Among other cases there is a case³ of the English Common Pleas, of *quare impedit* by a subsequent purchaser, after a conveyance of the estate by the same grantor to his son for value, in which Chief Justice Mansfield said that the plaintiff might have replied fraud in the father and have gone to issue thereon.

Suppose however that the prior alienation was made and taken, not with a view to another alienation of the same estate, but with 'intent to delay, hinder, or defraud' the grantor's creditors,⁴ but that afterwards the same grantor sells and conveys it again for value to another; will the purchaser be entitled to the estate in a contest either with the first grantee or with the grantor's creditors? This question received much consideration in a case⁵ before the Supreme Court of Michigan. In that case a debtor had conveyed lands in trust for the benefit of his creditors, by an assignment which was fraud-

¹ The saving itself, it should be noticed, relates to the *prior* of the two estates.

² *Hill v. Exeter*, 2 Taunt. 69; *Burrel's Case*, 6 Coke, 72; *Doe d. Newman v. Rusham*, 17 Q. B. 723; *Doe d. Richards v. Lewis*, 11 C. B. 1035, 1059; *Scott v. Scott*, 4 H. L. Cas. 1065, 1086 (per-

haps however referring only to fraud in the statement of the consideration).

³ *Hill v. Exeter*, *supra*.

⁴ The statute of 27th Elizabeth, unlike the other, does not require that the grantor should be a debtor. *Walker v. Burrows*, 1 Atk. 94.

⁵ *Fox v. Willis*, 1 Mich. 321.

ulent. Afterwards he mortgaged part of the same to a creditor who had notice of the assignment, and who sought to have the assignment set aside as in fraud of his rights as a *purchaser*. It was conceded that had he taken any other course he could have prevailed, as a creditor; but the court, reversing the decree of the Chancellor,¹ held that the assignment was not absolutely void, and was a fraud only upon creditors suing or claiming in the way of creation; hence the bill could not be maintained.

With the exception of a recent decision² to the same effect in Mississippi, this is almost the only case in which the question has clearly been argued by the courts; but there are not a few cases which in fact are opposed to it. The case of *Wright v. Tupper* of the time of Coke, to which reference has already been made, is one of them, apparently. There the father appears to have assigned the lease in fraud of his creditors, still retaining control as owner; and no doubt has ever been suggested that the later conveyance properly avoided the assignment, though we have seen, the case has often been before the courts. There are other English cases which support the decision.

In this country there are at least two decisions³ by courts of high authority, the one by inference, the other direct, opposed to the Michigan case. The first of these is a case

¹ Walk. Ch. 535, as *Fox v. Clark*.

² *Prestidge v. Cooper*, 54 Miss. 74. See also *Anderson v. Etter*, 102 Ind. 115. But this case *appears* to fall short of the doctrine of the Michigan case.

³ *Burrell's Case*, 6 Coke, 72, ante, p. 530.

⁴ *Lavender v. Blackstone*, 2 Lev. 146; s. c. 3 Keb. 526 and 826. On another point, not on this, this case was denied by Jessel, M. R. in *Trowell v. Shenton*, 8 Ch. D. 318. The case is stated, ante, p. 390. See also *Teynham v. Mullins*, 1 Mod. 119, where the settlement was indeed upheld against the

subsequent purchaser, but because the settlement was for value, otherwise it had been doubly invalid; *Lloyd v. Wood*, 3 De G. & J. 614, where a subsequent mortgagee prevailed over prior mortgagees who allowed the mortgagor to retain the title deeds and to create a fraud with them upon other creditors (see *Ferry-Herrick v. Atterton*, 2 De G. & J. 21; *Clarke v. Fennell*, 21 Ch. D. 124).

⁵ *Cathcart v. Robinson*, 5 De G. & J. 263; *Clapp v. Leatherbee*, 18 Ind. 131. See also *Anderson v. Etter*, 102 Ind. 115.

the Supreme Court of the United States. C conveyed all or nearly all of his lands and personalty by voluntary deed to W, in trust for C's wife, but continued thereafter to act as owner of it, as in the case just mentioned, having among other things offered parts of the land for sale; and finally he does agree for value to make sale to R, of lands contained in the deed to W. The facts, in the opinion of the court, showed personal fraud in the grantor at the time of the original transaction; and that fraud was in part at least a fraud upon creditors, for it is stated by the court as 'worthy of observation' that a request had been made to W to assign back a certain large claim conveyed to him, 'for the purpose of paying debts contracted by C.'

In the second case¹ it appeared that the holder of a mortgage of land had assigned it voluntarily for the purpose of avoiding an expected judgment against him in a suit pending. His death having now occurred, his administrator conveyed the mortgaged premises for value to a bona fide purchaser; and the purchase was held to have avoided the prior assignment, on the ground of meditated fraud, on the part of the assignor, against a creditor. The case was argued by counsel of great repute, one of them afterwards a very distinguished judge of the Supreme Court of the United States;² but the point argued was that the person intended by the fraud was not a creditor, and little appears to have been said in regard to the point that the *second grantee* was not a creditor.³ It appears to have been taken for granted that that made no difference; and the court expressly declared the assignment fraudulent; though a creditor had been intended, and 'therefore void, as to subsequent purchasers' under the 27th of Elizabeth.

¹ Clapp v. Leatherbee, *supra*.

² Hon. B. R. Curtis.

³ The report only shows that Leland for the second grantee said that his

client 'did not claim to be a creditor, and the allegation that the conveyance was made to defraud creditors was not a material part of the issue.'

As a matter of statutory construction the question tended with difficulties that might not otherwise arise, language of statute is fixed; at all events it is fixed case. And the language of the statute of 13th Elizabeth the effect that the alienations mentioned are to be tre void only against the persons hindered, delayed, or defi that is, in the words of the preamble, 'creditors and of and that the word 'others' was understood not to inclu chasers, the passing of the statute of 27th Elizabeth inc If then the case rested entirely upon the earlier of t statutes, it would be extremely difficult to say that purc could avoid conveyances made in fraud of creditors. Bu is a passage in the preamble of the later statute which what alters the case. It is there recited that alienation being made to deceive purchasers, *or* to the end that, 'secret intent of the parties, the same be to their own use;' and then, 'for remedy of . . . *such* fraudulent' tions the enactment of the statute was made. Now fraudulent conveyances of debtors are generally with 'of the parties' that 'the same be to their own proper more or less, it is at least arguable, upon the language English statute, which is common law in some of our s that purchasers may have the benefit of it. Besides it be strongly urged that a purchaser for value in good would be within the saving of section 4.

Perhaps the true view to be taken is this; not the prior conveyance (in fraud of creditors) is absolutely v as to leave the way clear for the later sale,—that c would not be true;² but that the purchaser finds the g in the exercise of ownership as if nothing had been don the facts then or afterwards brought to light, the badge presumptions of fraud, indicating that the conveyance w orable only show that notice, if there be notice, is not

¹ So in the District of Columbia. ² Ante, pp. 550, 551.
Cathcart v. Robinson, 5 Peters, 263.

an unlawful transaction.¹ The purchaser therefore may safely pay his money without stopping to inquire whether this unlawful transaction was entered into to defraud creditors or to defraud purchasers,² as clearly would be true in the purchase of chattels.³ If this view is correct, it follows that creditors of the grantor could not overturn the purchase for value. The question deserves the further consideration of the courts.

The other class of cases referred to at the beginning of the present section was alienations professedly on valuable consideration, but fictitious in that respect.⁴ That makes a plain subject for the operation of the statute; but what makes the transaction fictitious and so of bad faith touching the consideration? False recitals obviously;⁵ but it was found in considering the saving of the statute of 13th Elizabeth that inadequacy of consideration might be such as to show bad faith, — is the same true in the saving of the present statute?

The answer is in the negative; and nowhere is the desire of the courts more conspicuous to protect the claimants under the prior impeached estate than here. In some of the recent authorities the extension of the rules of law to meet the case is expressly mentioned. In a late decision⁶ of the Court of Chancery, on appeal, a question of priority of a mortgage over an earlier voluntary conveyance arose. A, being owner of a freehold estate worth, above incumbrance, £1,300, was induced by B to make a settlement of the same in favor of his, A's, wife and children; B undertaking, by way of inducement or consideration, to advance £150 to A on his promis-

¹ Cathcart v. Robinson, *supra*.

³ *Infra*, p. 562.

² Suppose that in the case in Dyer, 294 b, pl. 8 (the first case on 13th Eliz.) the defrauding debtor had sold the estate to a purchaser for value, without notice of the creditor's proceeding, is it likely that the purchase could have been upset by the creditor?

⁴ Mullins v. Guilfoyle, 2 L. R. Ir. 95, Palles, C. B.

⁵ *Ib.*

⁶ Bayspoole v. Collins, L. R. 6 Ch. 228.

sory note, to enable A to meet arrears of interest due on the incumbrance resting upon the estate in question. A afterwards made, for value newly given, the mortgage now in question. It was held that the settlement was entitled to priority over the mortgage, and this though only a small portion of the £150 had been paid over to A.

It is safe to say, at least upon American authority, that such a result could not have come about had the question arisen upon the 13th of Elizabeth,¹—on the claim of a creditor instead of a purchaser. And it is fair inference from the language of the court that the case was considered as resting upon the peculiar construction which had been given to the statute of 27th Elizabeth. Lord Hatherley remarked upon what he deemed the unsatisfactory state of the law touching settlements, to wit, that a person with full and distinct knowledge of a voluntary settlement could yet purchase the estate and overthrow the settlement. And what the settlor himself could not do directly, he could do indirectly by sale. And now, said his lordship, he would not say that the mode by which the courts had ‘attempted to remedy some of the evils of this state of the law, namely, by holding that a small and inadequate consideration is sufficient to support such a settlement under the statute of Elizabeth has diminished the extent of the mischief.’² And as further indicating that this was a new and special doctrine, Lord Hatherley remarked that the solicitor who drew the settlement, though doubtless a very good lawyer, probably did not know that the undertaking for the advance of £150 would support the settlement, and accordingly had resorted to certain shifts to make the appearance of a sufficient consideration.

¹ Or upon the declaratory part of the present statute. See ante, p. 534. authorities are sufficient to show that such a consideration, although merely

² ‘But so it is,’ his lordship goes on by way of loan secured by a promissory note, is adequate to support such a settlement. . . . The settlement.’

This case may be supplemented by a decision¹ rendered a few years later by Sir George Jessel, M. R. There had been a postnuptial settlement of fee simple estates, which belonged to the wife, by both husband and wife, to the use of the wife for life, then to such uses as she should by will appoint; and in default of appointment, to the use of her children, with power to the wife during her lifetime to lease, and with power of sale and exchange in the trustees with her consent. This was sustained against a subsequent mortgage for value, as being founded upon valuable consideration. That the alienation would not be sustained against a creditor, in this country, is probable, except in so far as, considered with reference to the pecuniary condition of the grantor, it was deemed reasonable; for it is generally held with us that even a release of dower is a valuable consideration for a conveyance by the husband, against the claims of his creditors, only in so far as it is reasonable.²

But the learned Master of the Rolls said that a settlement was not voluntary (under this statute he doubtless meant) if there was 'anything in the shape of a consideration which could be called value.' Here there were children, and the husband therefore would on surviving be tenant by the curtesy; this right was now given up, and also the husband's right to prevent his wife from aliening the estate during his lifetime. The wife's position had also been changed. To reach the conclusion however the court found several cases in the way, which must be either distinguished or doubted; and indeed they were doubted, a fact which goes further to show the advances made upon the doctrine of valuable consideration under the present statute.³

¹ In re Foster, 6 Ch. D. 87.

² Ante, p. 481.

³ The decision of the court in Goodright v. Moses, 2 W. Black. 1019, De Grey, C. J. appears to have been directly contra. The Master of the Rolls

disposes of it thus: 'The point that the husband gave value was not argued at all. In fact the points as to giving up the life estate and as to his parting with his control over the alienation of the estate were not argued.' Another

The decision was finally rested upon two recent cases before Lord Romilly, the other before Vice Chancellor : the latter then pending on appeal but shortly afterwards affirmed. Speaking of the first of these, the Master of the Rolls said that Lord Romilly had held that the conveyance attacked was for value. 'The husband gave up something very little, but he gave up his chance no doubt of an estate during the coverture . . . and an estate by the curtesy. And referring to the second case² the rule there laid down by Vice Chancellor Bacon, as follows, was adopted : If husband and wife, each of them having interests, no matter how small or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife, founded on valuable consideration.³

This last proposition appears to bring the case round to the doctrine of valuable consideration inter partes ; perhaps it goes still further. Gross inadequacy, between the con-

veyance in the way was *Currie v. Nind*, 1 M. & C. 17, which the Master of the Rolls could not understand or follow. Still another case was *Butterfield v. Heath*, 15 Beav. 408, by Lord Romilly. That case he considered contrary to *Hewison v. Negus*, 16 Beav. 594, by the same judge.

There is another case a few years later than the decision by Sir George Jessel, which, it seems, would need to be distinguished. *Shurmur v. Sedgwick*, 24 Ch. D. 597, Bacon, V. C. In that case a husband joined his wife in a settlement of freehold and leasehold property of which the wife was seised to her separate use. Both conveyed the freeholds to trustees, and the husband alone the leaseholds ; the settlement being partly in favor of the husband. Two years afterwards they mortgaged the property to secure a new debt ; no

children had been born. It was held that the settlement was voluntary, and the mortgagee prevailed. Bacon, V. C. 'The question therefore is, did the husband give up anything ? It is clear that he was tenant by the curtesy. Even if he disposed of the wife's estate, or if she sold her estate, or if she mortgaged her estate, or if the mortgagee puts the property up for sale, who can interfere with his right ? Certainly not the husband. . . . In my opinion he gave no consideration for the settlement.'

¹ *Hewison v. Negus*, 16 Beav. 594, affirmed on appeal, 22 L. J. Ch. 100. *Teasdale v. Braithwaite*, 4 Ch. D. 630.

² *Teasdale v. Braithwaite*, sup.

³ This proposition was quoted in *Teasdale v. Braithwaite*, affirmed on appeal from the decision of the Vice Chancellor, Bacon, V. C. 5 Ch. D. 630.

ing parties, is, it is true, only *evidence* of fraud by the better rule,¹ and that may disappear upon an examination of the other facts, as it did in the first case just cited. That is to say, the case taken altogether may show that the contract was entered into with full purpose, intelligently, and without deception or imposition. It would seem that under the *saving* of the statute of 27th Elizabeth gross inadequacy, at the present time, in the consideration for the settlement is really nothing at all. The cases already stated imply as much; and in one of them it is directly declared that the court does not enter into the quantum of the consideration.²

§ 7. STATE OF THINGS IN THIS COUNTRY.

The American law has for many years presented something approaching a blank in regard to the subject of the statute of 27th Elizabeth.³ Any such practice as that which appears to be not uncommon in England, of overturning voluntary conveyances of land by subsequent conveyances for value, was wellnigh smothered before it had become prevalent, by the form of statute generally adopted in this country touching

¹ *Harrison v. Guest*, 8 H. L. Cas. 26 (1846); *Fox v. Willis*, 1 Mich. 321 481, affirming 6 De G. M. & G. 424; (1849); *Gardner v. Boothe*, 31 Ala. 186 Jones v. Gordon, 2 App. Cas. 616; (1857); *McMahon v. Allen*, 35 N. Y. Earl v. Peck, 64 N. Y. 596. 403 (1866); *Alden v. Trubee*, 44 Conn. 455 (1876); *Prestidge v. Cooper*, 54 Miss. 74 (1877); *Anderson v. Etter*, 102 Ind. 115 (1885).

² *Townend v. Toker*, L. R. 1 Ch. 446, *Turner*, L. J.

³ The following list contains the most important American cases (relating to lands, the subject of 27 Eliz.): *Sterry v. Arden*, 1 Johns. Ch. 261; s. c. 12 Johns. 536 (1814, 1815); *Ricker v. Ham*, 14 Mass. 137 (1817); *Den d. Ridgeway v. Underwood*, 4 Wash. C. C. 129 (1821); *Cathcart v. Robinson*, 5 Peters, 263 (1831); *Clapp v. Leatherbee*, 18 Pick. 131 (1836); *Hudnal v. Wilder*, 4 McCord, 294 (1827); *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 499 (1843); *Hunters v. White*, 3 Gratt.

If however the suggestions of the text (*supra*, p. 555) are well founded, there is occasion still for cases in this country of lands sold of 'purpose and intent to deceive' purchasers, regardless of the laws of registration; for these, it is to be remembered, do not make lawful transactions which otherwise would be unlawful. *Robinson v. Elliott*, 22 Wall. 513. And of course failure to register might give occasion for cases of the kind.

purchasers, supplemented as that was by the universal laws. The statutes relating to purchasers none but purchasers without notice; and the registration fix notice of the prior conveyance upon the purchaser. these are the chief matters of the statute of 27th Eli. It is seldom that a case arises of an attempt to defeat a subsequent purchase where the prior one is not voluntary deed it is seldom that the first taker makes an attack, this statute, upon the second, though the leading American case was a case of that kind.²

Indirectly cases turning upon the statute occasionally but often so indirectly that it is doubtful whether the statute is thought of or deemed to apply. Perhaps indeed there is a new growth of doctrine parallel to that of the statute a single example may be given. In a recent case³ a bill in equity was filed against several persons. It appeared that on March 30, 1883, the plaintiff corporation had recovered judgment against J. Caldwell; attaching in that suit land which stood in the name of Caldwell's wife, on the ground that it had been conveyed to her by her husband in fraud of his creditors. At the time of the attachment the land was subject to a mortgage made by Mrs. Caldwell and held by another defendant Clark. After the attachment, but before judgment, a second mortgage was made to one Bates, and the executor was also a defendant. Later Clark sold under a power of sale, for breach of condition, satisfied his debt by paying over the surplus, in part to a certain bank prior to an earlier attachment, the rest to Bates. Both Clark and Bates knew of the plaintiff's action and attachment, though the plaintiff had given no notice of claim upon the proceeds of Clark's sale. The bill sought to charge Clark and

¹ *Perry-Herrick v. Attwood*, 2 De G. & J. 21, Lord Cranworth.

² *Western Union Tel. Co. v. Wells*, 141 Mass. 489.

³ *Sterry v. Arden*, 1 Johns. Ch. 261; 8. c. 12 Johns. 536.

executor of Bates for the money paid to Bates, and it was sustained.¹

In this country however the purposes of the statute of Elizabeth have generally been extended to transactions in goods and chattels. A second sale of a chattel, of which the vendor has retained possession, without change, notwithstanding his former sale, will give a good title, under the statutes, to the second purchaser if he buys without notice and takes possession.² This however is common law doctrine, and as such obtains in England. It differs in little if anything from the statute of 18th Elizabeth in regard to creditors; that subject has already been disposed of, and it need not be dwelt upon again merely to show its bearing upon purchasers.³ One observation however may be made, namely, that it is clear that a purchaser can have the benefit of the law in regard to sales

¹ Holmes, J.: 'If the attachment had been an ordinary attachment, in a suit against J. Caldwell, of lands standing in his name subject to a mortgage, and if the surplus had remained in the hands of Clark at the time this bill was brought, it is settled that the plaintiff would have been preferred to a subsequent mortgagee. *Wiggin v. Heywood*, 118 Mass. 514. . . . In a case like *Wiggin v. Heywood* the plaintiff's rights are founded on the lien originally acquired by his attachment, and they date from that. It is true that, as the lien is gone at law by the sale of the res, the substituted claim upon the proceeds has the characteristic infirmities of merely equitable rights. It may be, as used to be said of a trust, that it is not a "jus in rem," and therefore may be lost if the property is transferred for value and without notice. But it is attached to a specific fund in the mortgagee's hands. See *Cook v. Basley*, 123 Mass. 396; *Varnum v. Meserve*, 8 Allen, 158, 160; *Brown v. New Bedford Institution for Sav.* 137 Mass. 262, 266; *Talbot v.*

Frere, 9 Ch. D. 568, 573. And it may be asserted against privies taking the fund with notice as well as against the parties themselves. Year Book, 14 H. 8, 6, pl. 5,' and other cases cited.

'The notice which is sufficient to charge a privy with a trust is knowledge of it, actual or constructive. It is not necessary that the cestui que trust should give that notice or inform the assign that he intends to insist upon his rights. *Lewin, Trusts*, 7th ed. c. 29, § 1, 728 et seq.; *Boursot v. Savage*, L. R. 2 Eq. 134. We see no reason why more should be required as between an attaching creditor and a recipient of the fund on which he has an equitable lien, or why, if the recipient knows of the paramount attachment, and with that knowledge chooses to accept the fund, he should stand better than a purchaser from a trustee. *Mead v. Orery*, 3 Atk. 235, 238. See *George v. Wood*, 9 Allen, 80, 83.'

² *Baskins v. Shannon*, 3 Comst. 310; *Hanford v. Artcher*, 4 Hill, 271.

³ Ante, chapter 13.

of personalty, though the only fraud in the case was intended against creditors of the vendor. The only question is, whether he has bought for value, without notice, from one whom he had proper legal ground to believe to be the owner.¹

¹ As to what will make such a case see ante, pp. 326-335.

II. EVASION OF LAW BY PREFERENCE: INSOLVENCY AND BANKRUPTCY LAWS.

CHAPTER XXII.

GENERAL LEGAL VIEW OF OPEN PREFERENCES.

§ 1. DISFAVOR OF PREFERENCE.

OPEN preferences by insolvent debtors, though not under the odium, naturally, of secret preferences,¹ have in this country been looked upon with disfavor from the beginning; we have elsewhere² ventured to say that as a matter of principle they are of a fraudulent nature. Chancellor Kent long ago said that the right of an insolvent debtor to select one creditor and to exclude another produced results 'extensively felt and deeply deplored;' creditors residing abroad or at a distance were usually neglected; confidence was checked, and the credit and character of the country suffered.³ Mr. Justice Nelson followed this up with stronger language. Preference, he said, was the root of vice in assignments for creditors; the transaction became a mere pretence; property was put into the hands of a friendly trustee, and thus substantially secured to the control of the debtor long after the law presumed that it had passed from him.⁴ Other judges too have spoken in

¹ See Vol. 1, pp. 203-205. Secret preferences are more common to compositions than to other transactions.

² Ante, p. 7, note.

³ *Riggs v. Murray*, 2 Johns. Ch. 565, 577.

⁴ *Cunningham v. Freeborn*, 11 Wend. 240, 256.

similar condemnation of the practice;¹ and legislatures have spoken of it as 'excluding or *defrauding*' other just creditors,

¹ Mr. Senator Tracy in *Grover v. Wakeman*, 11 Wend. 187, 218: 'I know that the right of preference is advocated by many enlightened jurists, on the ground that the debtor, possessing an intimate knowledge of the relative equities of his creditors, can make a more just distribution than the law. But there is apparently an inconsistency in the laws denying the rightfulness of its own rules, and in its recognizing a difference between obligations which it has already decided to be equal. Besides it is anomalous that the law should defer its own wisdom and honesty to the wisdom and honesty of a delinquent party. The true reason why this right of preference has been allowed to the debtor is, that whilst the property is in his hands unshackled of legal liens and incumbrances, his power over it is absolute, and as he can dispose of it by sale to any person, so he may dispose of it by way of satisfaction to any creditor. . . . It is thought by some that this right of preference favors commercial enterprise, by affording to those destitute of capital a credit founded on the power of securing confidential, at the expense of business, creditors. If this be so, it is at best but a poor argument in its favor; for it is founded obviously in wrong. The facility of obtaining credit under such circumstances is, in theory, nothing more than a facility of committing fraud, and in practice it has proved nothing less. . . . I am satisfied that the experience of all commercial communities leads to the conclusion that this power of preferring creditors is a fruitful source of frauds, and in every respect mischievous and unwholesome. . . . The legislature has discountenanced it, by

denying the relief of our Insolvent Act to such debtors as have exercised it in contemplation of insolvency. If therefore it was a question arising now for the first time, whether an assignment by an insolvent which contained a provision securing a preference to favored creditors was or was not against the policy of the Statute of Frauds [against fraudulent conveyances], I should hesitate very much before I decided that it was not.'

Mr. Justice Wright in *Atkinson v. Jordan*, 5 Ohio, 178: 'The practice among speculating traders of shattered and desperate circumstances, of accumulating property upon credit with a desire of securing the means of satisfying the claims of confidential creditors, who contribute in various ways to keep up the credit upon which the property has been procured, and then passing these effects so procured into the hands of trustees, to be protected from legal process, and to be exhausted in satisfying those preferred claims, leaving all other creditors without a farthing, can hardly be justified on any sound moral or legal principle. . . . Equity delights in equality, and it is becoming a grave question whether courts of justice should longer countenance a sinking debtor in preferring one creditor to another in the distribution of his effects.'

Further see *Barker v. Hall*, 13 N. H. 301, *Woods, J.*; *Peck v. Merrill*, 26 Vt. 686, 692, *Isham, J.*; *Pingree v. Comstock*, 18 Pick. 46, 51, *Wilde, J.*; *Beers v. Lyon*, 21 Conn. 610, *Hinman, J.*; *Burd v. Smith*, 4 Dall. 76, 88, *Breckenridge, J.*; *Pierson v. Manning*, 2 Mich. 445, 448; *Hull v. Roane*, 22 Ark. 184, *Fairchild, J.*; *Burrill, As-*

and have declared it 'contrary to the first principles of equity and justice.'¹

Under the influence of such feelings the legislatures of the country have proceeded, in many states, to declare against the practice, when resorted to in assignments for creditors. In not a few of the states general assignments containing preferences of certain creditors have themselves been declared fraudulent and void by statute, because of the preference.² In as many other states preferences in general assignments are virtually forbidden, though the assignments themselves are not defeated; the result being that unsecured creditors take under the assignment upon an equal footing, regardless of any preferences, as in a quasi insolvency proceeding.³ And in some states the matter is regulated by insolvency laws,⁴ as it is in England by the statutes of bankruptcy.

Indeed so strong is the feeling against this practice of insolvent debtors that it has been declared by able and high-minded judges, who might well have been heeded more than they have been, that the practice, when not forbidden by law, should not be countenanced except in cases of general assignments; cases, that is to say, in which the debtor has turned over all his property, without reservation, for the benefit of the creditors. When he has done that, it was to be conceded that the common law gave him the right to prefer as

assignments, § 163, note; *Turnipseed v. Schaefer*, 76 Ga. 109.

¹ Ga. St. of Dec. 19, 1818, preamble, quoted in full in Burrill, *Assignments*, § 163, note.

² Burrill (*Assignments*, § 165) mentions no less than eleven states in which there has been such legislation, to wit: California, Colorado, Connecticut, Delaware, Iowa, Kansas, New Hampshire, Michigan, Missouri, and Oregon.

'Either principle, that of assignment or that of preference, standing by itself, might very well be questioned;

but brought together, they form an unnatural coalition, from which little that is salutary or honest can be anticipated.' Mr. Senator Tracy, in *Grover v. Wakeman*, 11 Wend. 187, 218.

³ The following states have legislation of that kind: Alabama, Illinois, Indiana, Kentucky, Maine, Minnesota, Nebraska, Ohio, Pennsylvania, Tennessee, and Vermont. In New Jersey preferences in such cases are declared fraudulent and void. Burrill, *ut supra*.

⁴ See e. g. Mass. Pub. Sta. c. 157, §§ 96-99, *infra*, p. 574.

he pleased, so long as he retained no benefit or powers in the transaction; it mattered not that the claim of a single preferred creditor exhausted the whole estate. But if instead of turning over the whole of his estate, the debtor made but a partial transfer, and in that transfer assumed to exercise a right of preference among those designated as favored, he was going too far, and the transaction was to be treated as a fraud.¹

But that view is disputed, and has not obtained the foothold it deserves.² In those states in which statutes exist against assignments with preferences, it is held that the law does not forbid the payment or securing of particular creditors in the ordinary course of business.³ In many of the states the common law of preference has not been changed.⁴

§ 2. PREFERENCE A MATTER OF BANKRUPTCY LAWS.

The rule against open preference is in England and largely in this country a rule peculiar to statutes of, or in the

¹ *Goodrich v. Downs*, 6 Hill, 438, 439; *Bronson, J.*; *Barney v. Griffin*, 2 Comst. 365, 371; *Bronson, J.*; *Burdick v. Post*, 12 Barb. 168, 175; *Rathbun v. Platner*, 18 Barb. 272, 275.

² *Wilson v. Forsyth*, 24 Barb. 105, 122; *Grover v. Wakeman*, 11 Wend. 187, 195 (before *Goodrich v. Downs*, supra); *Price v. De Ford*, 18 Md. 489; *Gray v. McCallister*, 50 Iowa, 497; *Grubbs v. Morris*, 103 Ind. 166; *Newmann v. Calumet & Hecla Mining Co.* 57 Mich. 97; ante, p. 271, note.

³ *Danforth v. Denny*, 25 N. H. 155; *Barker v. Hall*, 13 N. H. 298; *Low v. Wyman*, 8 N. H. 536; *Henshaw v. Sumner*, 23 Pick. 446; *Fairbanks v. Haynes*, ib. 323; *Brown v. Porter*, 2 Met. 152; *Bates v. Coe*, 10 Conn. 280 (but see *Gen. Sta.*, Rev. 1875, p. 378); *Tillou v. Britton*, 4 Halst. 120; *Garr v. Hill*, 1 Stockt. 210, 215; *Moses v.*

Thomas, 26 N. J. 124; *Van Waggoner v. Moses*, ib. 570; *Garrison v. Brown*, ib. 425; *Miller v. Conklin*, 17 Ga. 430, 433; *Lavender v. Thomas*, 18 Ga. 668, 675; *Doremus v. O'Harra*, 1 Ohio St. 45; *Bloom v. Noggle*, 4 Ohio St. 45; *Harkrader v. Leiby*, ib. 602; *Atkinson v. Tomlinson*, 1 Ohio St. 237; *Justice v. Uhl*, 10 Ohio St. 170; *Gray v. McCallister*, 50 Iowa, 497; *Lampson v. Arnold*, 19 Iowa, 479.

As to the distinction between assignments and sales or mortgages see the cases cited ante, p. 271. *Chicago Coffin Co. v. Maxwell*, 70 Wis. 282; *Landauer v. Vietor*, 69 Wis. 434; *Aulman v. Aulman*, 71 Iowa, 124; *Watterman v. Silberberg*, 67 Texas, 100; *Weil v. Polack*, 30 Fed. R. 813.

⁴ See *Burrill*, § 165. But it is not safe to make a list of these, for the number is diminishing.

nature of, bankruptcy; apart from bankruptcy, insolvency, or the like laws, a debtor may prefer one creditor over another, even though with intent to defeat the latter.¹ Nay, that rule is peculiar to bankruptcy *proceedings*, — the rule, that is to say, by which mere preferences are invalidated. Lord Ellenborough indeed once called it an excrescence upon the bankruptcy laws;² in his day it formed no part of the statute. That is not true now, but still the doctrine has no place except in proceedings in bankruptcy, and in what is a phase of the same, winding up proceedings. Unless the act or conduct in question is brought within the meaning of the statute of 13th Elizabeth, none but creditors in bankruptcy or in winding up have any right to raise a question against a mere open preference.³

In the first of the cases cited insurance money had been paid upon judgment to the defendants in respect of their claims against a company (the assured) of which they were creditors for money advanced. The company, of which the defendants were also directors, had issued mortgage debentures, each of which was in form a first charge upon all the company's property present and future, including uncalled capital, subject to a condition that such charge should be a floating security, and that the company might, in the course

¹ Wood v. Dixie, 7 Q. B. 892; Darvill v. Terry, 6 Hurl. & N. 807; Dudley v. Danforth, 61 N. Y. 626; Shelley v. Boothe, 78 Mo. 74; McVeagh v. Baxter, 82 Mo. 518; Holmes v. Braidwood, ib. 610; Ayers v. Adams, 82 Ind. 109; Lewy v. Fischl, 65 Texas, 311; Wilson v. Berg, 88 Penn. St. 167; Olmsted v. Mattison, 45 Mich. 617; Dyer v. Rosenthal, ib. 588. Further see ante, p. 490. But see Blum v. Schram, 58 Texas, 524; Frazer v. Thatcher, 49 Texas, 26 (these two cases would seem to be overruled by Lewy v. Fischl, supra); Bixby v. Carskaddon, 55 Iowa, 533; Ferris v. Irons, 83 Penn. St. 179;

Butler v. White, 25 Minn. 432. See ante, p. 491, note.

² Crosby v. Crouch, 2 Camp. 165, 168.

³ Willmott v. London Celluloid Co. 31 Ch. D. 425; Bacon, V. C., affirmed 34 Ch. D. 147, C. A.; Ex parte Cooper, L. R. 10 Ch. 510; Middleton v. Pollock, 2 Ch. D. 105, Jessel, M. R. See Alton v. Harrison, L. R. 4 Ch. 622; Gardner v. Lane, 9 Allen, 492. Burt v. Perkins, 9 Gray, 317; Penniman v. Cole, 8 Met. 496; Eastman v. Eveleth, 4 Met. 137, 148; Berry v. O'Connor, 33 Minn. 29; Smith v. Diedrick, 30 Minn. 60; Hayden v. Allyn, 55 Conn. 280. See Hanscom v. Buffum, 66 Maine, 246.

of its business, deal with the property charged in such manner as it thought fit. A holder of one of these debentures brought an action for himself and other holders against the company and the directors above referred to, claiming repayment of the insurance money. Two days later a petition for winding up the company was presented which was shortly afterwards followed by a winding-up order.

The argument for the holders of the debentures was that the payment of the insurance money to the defendants in respect of their claims against the company should be treated as a fraudulent preference within section 164 of the Company's Act, 1862; which provides that any act relating to property which would in bankruptcy be a fraudulent preference should be considered as such in the winding up of the company, so that money recovered under a claim on account of fraudulent preference would be recovered for the general creditors as if it had been recovered by the trustee in bankruptcy. It was held both in the lower court and in the Court of Appeal that the section had no application to the case, and also that the doctrine of preference generally could not be invoked in any such proceeding.¹

The same doctrine applies to the case of an insolvent debtor who dies before proceedings in bankruptcy.² In the case cited it appeared that an insolvent debtor, a solicitor, had received from one of his clients, a lady, money for investment; that the solicitor had died without investing the money, and without having been adjudged a bankrupt; that

¹ Cotton, L. J.: 'The Vice-Chancellor held that the section did not apply, and dismissed the action so far as it related to this claim. I think he did so rightly, because the section is only intended to apply in the case of a winding up and for the benefit of the general creditors. Here the plaintiff is seeking to enforce his claim independently of the winding up. And in the case of

Ex parte Cooper, L. R. 10 Ch. 510, it was decided that the doctrine of fraudulent preference is not one to be taken advantage of by a mortgagee but only for the benefit of the whole body of creditors. The 164th section relates only to a case similar in all respects to that which arises in bankruptcy.'

² *Middleton v. Pollock*, 2 Ch. D. 105.

by a memorandum found in his safe after his death he had declared himself a trustee of certain leaseholds held by him in mortgage, and of a bill which he had indorsed to his client, to secure payment of the money put into his hands by her. A creditor's suit having been brought for the administration of the solicitor's estate, it was held that the lady was entitled to the benefit of the trust, even though the solicitor knew of his condition at the time.¹ So too a debtor who has been ordered to pay money into court may, in anticipation of a writ of sequestration about to issue, convey all his property to trustees for the benefit of part of his creditors, if the conveyance is made honestly for them.²

¹ Jessel, M. R. : 'As between these preferred clients and the rest of his clients . . . there is no law which prevents a man in insolvent circumstances from preferring one of his creditors to another except the bankruptcy law. . . .

But Mr. Pollock [the solicitor] was not a bankrupt, and the bankruptcy law has no application to him.'

² *Alton v. Harrison*, L. R. 4 Ch. 622.

CHAPTER XXIII.

THE STATUTES, ENGLISH AND AMERICAN.

THE English Bankruptcy Act, 1883,¹ contains the following provision in regard to preferences : —

Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered² by any person unable to pay his debts as they become due, from his own money, in favor of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same is adjudicated bankrupt on a bankruptcy petition presented within three months³ after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy.⁴

In not a few of our states insolvency laws exist, which in the absence of a national bankruptcy law are of course of full

¹ 46 and 47 Vict. c. 52, § 48.

² See *Billiter v. Young*, 6 El. & B. 1, Ex. Ch., warrant of attorney to confess judgment.

³ As to changes of the period of the statute see *Auffmordt v. Rasin*, 102 U. S. 620.

⁴ And by § 28 (3), f, the bankrupt's discharge shall be refused if within three months preceding a receiving order, when unable to pay his debts as they become due, he has given an undue preference to any of his creditors.

To put an end to a current speculation on the best terms, before debts are incurred in it, would not fall within the meaning of the statute. *Miller v. Barlow*, 8 Moore P. C. N. s. 127.

Legislation in bankruptcy in England runs back to the time of Henry the Eighth. 34 and 35 Henry 8, c. 4 ; 13 Eliz. c. 7 ; 1 Jac. 1, c. 15 ; 6 Geo. 4, c. 16 ; 12 and 13 Vict. c. 106 ; and then the recent acts of 1861, 1869, 1872, 1883.

effect. All these acts, of necessity, regulate preferences, declaring when preferences are to be treated as fraudulent or invalid. The statutes vary considerably, though agreeing in certain general features pertaining to the subject to be considered here. Those of a few states are selected as representative, omitting provisions not relating to the present subject. The state legislation is indeed likely to be superseded by a national bankruptcy law ; but, so far as the present subject is concerned, such law can hardly fail to follow the general lines laid down in the legislation of the states.

The following is the statute of California : ¹ —

§ 8. If any person, being insolvent, or in contemplation of insolvency within two months before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe that such person is insolvent, and that such attachment, seizure, payment, pledge, conveyance, transfer, or assignment is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade any of the provisions of this act, or of the act or acts to which this act is supplemental, or of which this act is amendatory, such transfer, payment, conveyance, pledge, or assignment is void, and the assignee may recover the property, or the value thereof, as assets of such insolvent debtor ; and if such sale, assignment, transfer, or conveyance is not made

¹ Stats. 1875-1876, c. 419.

in the usual and ordinary course of the business of the
the fact shall be prima facie evidence of fraud.

The following is the statute of Delaware :¹ —

§ 4. If any person in contemplation of insolvency
contemplation of taking the benefit of any of the in
laws of this state, shall make an assignment of his es
effects for the benefit of creditors, and by such assign
either under its provisions or otherwise, shall pref
creditors to others, or shall, in or by such assignment,
or pay to any creditor a greater proportion of his d
demand than shall be secured or paid to all his cre
every such assignment so giving a preference shall be c
fraudulent and absolutely void, and the estate or effect
tained therein shall be liable to be taken in execut
attached for the payment of such assignor's debts, as f
if no such assignment had been made ; and the person n
such fraudulent assignment shall for ever be deprived
benefit of any insolvent law of this state.

The following is the statute of Kentucky :² —

§ 1. Every sale, mortgage, or assignment made by de
and every judgment suffered by any defendant, or any
device done or resorted to by a debtor, in contemplat
insolvency. and with the design to prefer one or more
tors to the exclusion in whole or in part of others,
operate as an assignment and transfer of all the proper
effects of such debtor, and shall enure to the benefit of
creditors (except as hereinafter provided) in proportion
amount of their respective demands, including those
are future and contingent ; but nothing in this article
vitiate or affect any mortgage made in good faith to
any debt or liability created simultaneously with such
gage, if the same be lodged for record within thirty days
its execution.

¹ Laws of 1874, c. 182.

² Gen. Sts. c. 4, art. 2.

The following is the statute of Maryland : ¹ —

§ 7. Any confession of judgment, and any conveyance or assignment, made by any insolvent under this article for the purpose of defrauding his creditors or giving an undue preference, shall be void, and the property or thing conveyed or assigned shall vest in the trustee ; and all acts done by a petitioner before his application, when he shall have no reasonable expectation of being exempted from liability to execution, on account of his debts or responsibilities, without petitioning for the benefit of the insolvent laws, shall be deemed to be within the meaning and purview of this section.

§ 8. Any judgment or decree confessed to give an undue preference to any creditor, or for the purpose of defrauding any creditor, shall be void, and excluded in the distribution under this article.

The following is the statute of Massachusetts : ² —

§ 96. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, with a view to give a preference to any creditor or person who has a claim against him, or is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent or in contemplation of insolvency, and that such payment, pledge, assignment, or conveyance is made in fraud of the laws relating to insolvency, the same shall be void ; and the assignees may recover the property, or the value of it, from the person so receiving it or so to be benefited.

¹ Pub. Gen. Laws, art. 48.

² Pub. Sta. c. 157. This is one of our oldest statutes, and has been taken as a model in several of the states.

§ 97. The provisions of the four preceding sections do not apply to a payment of money or transfer of property by payment, not exceeding twenty-five dollars in amount, of debt contracted for necessities furnished to the debtor and his family.

§ 98. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, makes a sale, assignment, transfer, or other conveyance of any description, of any part of his property, to a person who then has reasonable cause to believe that such sale, assignment, transfer, or other conveyance was made with a view to prevent the property from coming into the hands of the assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way to impair, hinder, impede, or obstruct the operation and effect of, or to evade, any of such laws, the sale, assignment, transfer, or conveyance is void, and the assignee may recover the property, or the value thereof as assets of the insolvency. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be prima facie evidence of such cause of belief.

These statutes will now be considered in a manner corresponding to that in which the statutes of Elizabeth are treated; the subjects, in order, being as follows: (1) what the statutes embrace, (2) modes of alienation, (3) who are affected by them, (4) against what the statutes aim, (5-7) the consequences of fraudulent preference. The English statute in regard to acts of bankruptcy will be added, and some observations from the authorities.

CHAPTER XXIV.

CONSTRUCTION OF THE STATUTES.

§ 1. WHAT THE STATUTES EMBRACE.

It is plain that both the English and the American statutes in regard to preference are intended to embrace all the debtor's property of every sort,¹ except such as is actually or virtually exempt from the claims of creditors. The bankruptcy and insolvency statutes evidently go hand in hand with the statute of Elizabeth and the like legislation in this country, except that that legislation is perfectly general while the legislation now to be considered is confined to alienations by insolvent debtors. For what then is embraced in the word 'preference' in regard to property the learned reader is referred to what has been said in section 2 of chapter 4, and at the beginning of chapter 5, subject to such change as the nature of the subject matter to be dealt with may require. The statutes should, it seems, be liberally construed against fraud.²

§ 2. MODES OF ALIENATION.

It is equally plain that both the English and the American statutes have been framed to embrace every sort of disposition of property which the wit of a dishonest debtor can devise, as we have seen to be true of the statute of 13th

¹ It is no preference for a creditor to receive from his debtor property the title to which has never passed, at law or in equity, to the debtor. *Grout v. Hill*, 4 Gray, 361, return of goods shipped under contract of sale.

² See chapter 4; *White v. Cotzhausen*, 129 U. S. 329.

Elizabeth and the corresponding American legislation analogy between that statute and the statutes now to be considered is indeed close enough; just as the statute of Elizabeth was designed to meet all the devices which debtors might resort to in order to secure their property from the reach of creditors, so the present statutes in general, touching preferences, in particular, are intended to prevent insolvent debtors, by whatever device, from keeping property out of the hands of the law for equal distribution. It is believed therefore that we may safely refer to what has been said on modes of alienation in chapter 5 as applicable *mutatis mutandis*, and as far as the nature of the case allows, the language of the statute¹ allow, to the present statutes. As before, the term 'alienation' will often be used for convenience as the general equivalent of all the transfer devices of the statutes.

§ 3. WHO ARE AIMED AT: CREDITORS.

In order to bring a case within the meaning of the Elizabethan statute, it is held to be necessary that the technical relation of debtor and creditor should exist between the parties at the time of payment or transfer at the time of the act.² It was accordingly decided in a recent case⁴ that where one of the

¹ 'The provisions of the statute are as broad and sweeping as possible, and are levelled against the most indirect and circuitous preferences.' Foster, J., in *Crafts v. Belden*, 99 Mass. 535, 539; *Burpee v. Sparhawk*, 97 Mass. 342, consignment of goods within the statute. For special modes see *Chadbourne v. Harding*, 80 Maine, 580; *King v. Moody*, 79 Ky. 63; *Traders' Bank v. Campbell*, 14 Wall. 87.

² This should be noticed; the language of a particular statute may require special construction. Thus in

regard to 'suffering and giving' preference under the late national bankruptcy law, those words were held to include mere non-resistance by debtor to judicial proceedings against him. *Wilson v. City Bank*, 100 Mass. 473; *Clark v. Iselin*, 21 Wall. 473; *Tenth National Bank v. Ward*, U. S. 539.

³ Contra in Massachusetts. *Moore*, 133 Mass. 198.

⁴ *Ex parte Taylor*, 18 Q. B. 100, C. A.

trustees having sole charge of trust funds made payment of money to one of his associates to save him harmless from the consequence of a misappropriation of the fund by the trustee making such payment, there was no preference within the meaning of the statute.¹ Indeed it is laid down that not only does not the relation of debtor and creditor exist between cotrustees in such a case, — that relation does not exist between the defaulting trustee and the cestuis que trust whom he has wronged.²

Upon this point there appears to be a difference between the English statute and certain if not all of the American statutes. The Massachusetts legislation, which has been copied or taken as a general model in several of the states, is directed in terms against preferences given within the time limited 'to any creditor or person who has a claim against him or is under any liability for him,' and has cause to believe etc.; a provision that could not but be held to embrace others than mere creditors in the strict sense. In a recent case,³ similar to the English case above stated,⁴ the person who misappropriated the money being a guardian instead of a trustee, it was held that the preference of the ward, made to amend the misappropriation, was within the statute, and therefore was fraudulent; and this, not on the ground that the ward was properly a creditor of the wrongdoer, but that he had 'a claim' against him.⁵ The statute would embrace persons conditionally liable for the debtor, as by endorsement.⁶ How those statutes are to be understood which use only the word 'creditors' touching the preference does not appear.

¹ On authority of *Ex parte Stubbins*, 17 Ch. D. 58 C. A.

² *Ex parte Taylor*, supra; *Ex parte Stubbins*, supra; *Sinclair v. Wilson*, 20 Beav. 324. See *ex parte Kelly*, 11 Ch. D. 306, C. A.

³ *Bush v. Moore*, 133 Mass. 198.

⁴ *Ex parte Taylor*, supra.

⁵ See also *Wagener v. Boynton*, 7 S. E. R. (S. Car.) 481.

⁶ *Bartholow v. Bean*, 18 Wall. 635.

§ 4. AGAINST WHAT THE STATUTES AIM: FRAUDUL
PREFERENCE.

The statutes are nearly all of one import; the English statute being aimed at alienations in favor of a creditor 'with a view of giving such creditor a preference over the creditors;' the Massachusetts statute and its followers substantially the same language, though extending the provision to others than creditors *stricto sensu*; the Kentucky statute using the words 'with the design to prefer more creditors to the exclusion in whole or in part of others;' the Maryland statute, the words 'for the purpose of defrauding his creditors or giving an undue preference;' the Delaware statute however more simply declaring against alienations by persons who 'shall prefer any creditors to others.' In all the statutes declare in terms that such alienations shall be treated as fraudulent and void;¹ so that the intent to defraud is, legally speaking, 'intent to defraud.'

Those of the statutes which speak of acts done 'with a view,' or 'with the design,' or 'for the purpose' of preferring creditors require personal intention on the part of the debtor;² the intention is intention to *prefer*, not to defraud in the popular sense of that word. The mere fact of preferring creditors therefore is not enough, under such statutes.³ A debtor who accordingly turns property over for the purpose of preventing a criminal prosecution or an exposure; there is no 'view'

¹ The Kentucky statute uses different language, but it comes to the same thing. Ante, p. 573. The wrongful act may be affirmed by the assignees. *Snow v. Lang*, 2 Allen, 18. Preference refers of course to antecedent debt. *Tiffany v. Boatman's Sav. Inst.* 18 Wall. 375. Hence loans may safely be made to an insolvent debtor so far as the law of preference is concerned. *Ib.*; *Hutton v. Crutwell*, 6 El. & B. 296; *Harris v. Rickett*, 4 Hurl. & N. 1.

² *Cook v. Rogers*, 7 Bing. 438; *Bills*

v. Smith, 6 Best. & S. 314; *Grafton Mills*, 117 Mass. 228.

³ *Ex parte Taylor*, 18 Q. B. 100; *Wilson v. Bank*, 17 Wall. 414; *Mays v. Fritton*, 20 Wall. 414; *Iselin*, 21 Wall. 360; *Watson v. Lor*, *ib.* 378; *Sage v. Wynco*, 10 U. S. 319; *Smith v. Merrill*, 144; *Perkins v. Webster*, 2 Cus. 144; *Parsons v. Topliff*, 119 Mass. 24; *v. Grafton Mills*, 117 Mass. 228; *v. Howe*, 102 Mass. 427.

preferring' in such a case.¹ And the same is to be said of cases in which the debtor turns over property or securities in good faith to a creditor with the sole view to enable the debtor to continue his business.² But in this country slight acts may be sufficient to show a design to prefer.³

It seems that the transaction is not to be regarded as having taken place with a view to preference where the creditor was already well secured and merely receives from the debtor, though with knowledge of his insolvency, what he was reasonably sure of being able to receive from the security he held. Thus a creditor holds a note signed by his debtor, who becomes insolvent, the note being indorsed by perfectly responsible parties. When the note becomes due the debtor offers other good notes and a sum of money, to be taken in part payment of the original note; and the same are accepted. This is not an unlawful preference.⁴ The same would be true of a creditor's taking possession of property from the debtor, to which he had become lawfully entitled, as e. g. by mortgage not within the insolvency law, though the property had been left with the debtor some time after the creditor's right to it was created, and until the period within which preference was forbidden;⁵ unless indeed the debtor has been held out or permitted to appear as still the owner.⁶

¹ *Ex parte Taylor*, 18 Q. B. D. 295.

² *Smith v. Merrill*, 9 Gray, 144; *infra*, pp. 589-591.

³ *Sage v. Wyncoop*, *supra*. 'In contemplation of bankruptcy' does not mean the same thing as 'with a view to give a preference,' in connection with a provision that the debtor's act shall be invalid if he was 'at the time insolvent;' for in this latter case he may have done the act without contemplating bankruptcy. 'We think the phrase "with a view to give a preference" must be construed somewhat less strictly, so as to include an intent to give one creditor any advantage over others in

respect of payments or securities of his debt.' *Forbes v. Howe*, 102 Mass. 427, Welles, J. See *Wager v. Hall*, 16 Wall. 584.

Even intent to prefer may not be enough; that will depend upon the purpose of the proceeding and the language of the statute. *Ex parte Jordan*, 9 Met. 292. See also *Penniman v. Cole*, 8 Met. 496.

⁴ *Stevens v. Blanchard*, 3 Cush. 169.

⁵ *Mitchell v. Black*, 6 Gray, 100.

⁶ Further as to intention to prefer see *Bernheim v. Christal*, 76 Cal. 567; *Hanford Oil Co. v. First National*

The effect of a preference again may in England be effected by the operation of the Bills of Sale Act¹ in a particular case. That Act avoids the title of the grantee of goods which are at the time of the grantor's bankruptcy in the 'possession of the grantor.' If the goods are not in his present possession, the statute does not invalidate the transaction and it has been decided by the Court of Appeal that it does not matter that the possession of the claimant was not in a way that, in itself, would amount to a fraudulent preference.² That is, it does not matter in such a case that a debtor transferred the property to the creditor with a view to preferring him; the case is within and governed by the Bills of Sale Act. Valid by that Act, the sale is good, and without the Act it would be invalid.

Again what appears to have been a fraudulent preference may, in England and in some of our states, be shown to have been a lawful transaction by evidence that the payment or transfer was only the mere formal act of carrying out

Bank, 126 Ill. 584; *Tiffany v. Lucas*, 15 Wall. 410; *Buchanan v. Smith*, 16 Wall. 277; *Wager v. Hall*, ib. 584.

In *Wager v. Hall*, supra, the court says: 'The transfer by a debtor who is insolvent of his property or a considerable portion of it, to one creditor as a security for a pre-existing debt, without making any provision for an equal distribution of its proceeds to all his creditors, operates as a preference to such transferee and must be taken as prima facie evidence that a preference was intended . . . ; and that a transfer by an insolvent debtor of his property or any considerable portion of it, with a view to secure it to one creditor and thus prevent an equal distribution among all his creditors, is a transfer in fraud of the Bankrupt Act. *Toof v. Martin*, 13 Wall. 40; *Nary v. Merrill*, 8 Allen, 452; *Metcalf v. Munson*, 10

Allen, 491; *Scammon v. C.* B. R. 263.'

¹ 41 & 42 Vict. c. 31.

² *Ex parte Symmons*, 14 Ch. C. A. *Cotton, L. J.*: 'The question were in the actual possession of S & H at the time of the liquidation petition. How do trustees [in bankruptcy] make a title? The goods had been assigned to S & H. But it is said that the transaction was wrongful, because the goods were acquired by what . . . I will call a fraudulent preference. The Bills of Sale Act avoids the title of the grantee only as regards goods which were in the apparent possession of the grantor at the time of the bankruptcy. The goods now in question were not in the apparent possession of the bank at that time; they were in the express possession of S & H.'

agreement made before the time within which preferences are forbidden ; as e. g. where a debtor, knowing himself to be insolvent, makes a payment to his creditor in pursuance of a distinct and valid contract to do so made while the debtor was solvent,¹ or where the insolvent gives a security in virtue of such a contract.² The contrary is laid down in Massachusetts.³ It is clear that there is no preference when the title to the property turned over by the debtor was already in equity, though not at law, in the creditor.⁴

§ 5. THE SAVING: THE ENGLISH STATUTES AND THEIR MEANING.

The English Bankruptcy Act, 1883, section 48, provides that the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt shall not be affected by the enactment in regard to fraudulent preference.⁵ Section 49 of the same Act provides that subject to the prior provisions of the Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, bankruptcy should not invalidate (a) any payment by the bankrupt to any of his creditors ; (b) any payment or delivery to the bankrupt ; (c) any conveyance or assignment by the bankrupt for valuable consideration ;⁶ (d) any con-

¹ *Ex parte Kevan*, L. R. 9 Ch. 752, 758; *Broughton v. Vasquez*, 73 Cal. 325. *Comp. Gilbert v. Vail*, 60 Vt. 261, as to recording a mortgage made before the period.

² *Ex parte Hodgkin*, L. R. 20 Eq. 746. Further see *Field v. Grohegan*, 16 N. E. R. (Ill.) 912.

³ *Copeland v. Barnes*, 147 Mass. 388, 390 ; *Forbes v. Howe*, 102 Mass. 427, 435 ; *Simpson v. Carleton*, 1 Allen, 109, 120 ; *Blodgett v. Hildreth*, 11 Cush. 311. *Comp. cases relating to connect-*

ing transactions under the Statute of Frauds, ante, pp. 133, 161, note.

⁴ *Hanselt v. Harrison*, 105 U. S. 401.

⁵ 46 & 47 Vict. c. 52, § 48, 2.

⁶ So in this country. *Smith v. Merrill*, 9 Gray, 144 ; *Sawyer v. Turpin*, 91 U. S. 114, exchange of securities of equal value ; *Clark v. Iselin*, 21 Wall. 360, same ; *Cook v. Tullis*, 14 Wall. 382 ; *Tiffany v. Savings Inst.* id. 375.

tract, dealing, or transaction by or with the bank for valuable consideration: Provided both (1) the payment, delivery, conveyance, assignment, contract, dealing, or transaction, takes place before the date of the receiving order, and (2) the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, was not, at the time of the payment, delivery, etc. notice of a possible act of bankruptcy committed by the bankrupt at that time.

'Valuable consideration' in these statutes, and, I believe, in the American statutes also, means the same as is meant in the statute of 13th Elizabeth by value (under the name of 'good') consideration, and not what is meant by that term under the statute of 27th Elizabeth; indeed the recent decisions upon the latter statute have the effect to enlarge the whole conception of the term, and it is hardly probable.¹ Indeed the Court of Appeal, as we have seen, has declared that the rule as determined under the statute of 27th Elizabeth is to be taken as peculiar to that statute arising under that piece of legislation.² That was done in a case of bankruptcy too; and the general doctrine as to value, as stated in chapter 18,³ was apparently treated as applicable to the subject, though the learned Lord of the Rolls cautiously put the case upon the ground of the distinction between the popular and the legal meaning of 'purchaser.'⁴

¹ Ante, pp. 543 et seq.

² Ante, p. 446, note.

³ Ante, pp. 446 et seq.

⁴ Ex parte Hillman, 10 Ch. D. 622, C. A. Sir George Jessel: 'I think that in this section [§ 91, Bankruptcy Act, 1869] the word "purchaser" means a "buyer" in the ordinary commercial sense, not a purchaser in the legal sense of the word.' But Lord

Justice James, who had decided the much cited case under 27 Elizabeth (Price v. Jenkins, 5 Ch. D. 618), said: 'Price v. Jenkins was a decision upon the statute 27 Elizabeth, and the effect of it was to prevent fraud.' In referring apparently to the doctrine of consideration laid down in that case, so too Jessel, M. R. in the case of Ex parte Hillman, said: 'The argument in Ex parte Hillman

Subject to the terms of section 49, above stated, and within the meaning, as it seems, of that section, a payment or transfer made by an insolvent debtor to one of his creditors in the 'due course of business' falls without the prohibition of the statute.¹ This rule that a payment made in the due course of business cannot be treated as a fraudulent preference, sometimes indeed goes very far. In one case² it appeared that certain directors of a company who owned shares which they had never been called upon to pay for, had become liable by guaranty for money advanced by a bank to the company. The company having fallen into difficulties, and the bank having recovered judgment against the guarantors, a resolution was passed by the company recommending all the directors to pay in advance the amount of their shares, with a view to reducing the debt due to the bank. The guaranteeing directors paid in a sum equal to the amount of their shares, which was carried to the credit of the company at the bank. Two days later a petition was presented upon which a winding up of the company was ordered; and in the winding-up proceedings it was contended that the payment mentioned was a fraudulent preference. This position was sustained in the lower court; but the Court of Appeal held that the payment was made in due course of business and was valid.³

A transfer or payment is in due course of business, in the first place, when made, in respect of a past debt, to a creditor who has no notice of the insolvency of the debtor. A creditor justly ignorant of the situation of his debtor does not receive payment of his debt at the peril of having to refund, for the benefit of others, if it should turn out that the debtor was insolvent at the time.⁴ Thus the honoring bills of exchange at

¹ Lord Mansfield puts the case of payments made under pressure as being made in due course. *Rust v. Cooper*, 2 Cowp. 629, 634.

² *Poole's Case*, 9 Ch. D. 323, C. A.

³ The directors, it was held, were

trustees not of the creditors of the company but of the stockholders.

⁴ *Ex parte Butcher*, L. R. 9 Ch. 595; *Ex parte Blackburn*, L. R. 12 Eq. 365.

See *In re Tempest*, L. R. 8 Ch. 70.

Again transfers and payments in respect of past due in due course when made to a creditor upon a 'fair lent,' aside from the debt. And this, in its ordinary signification, means that where advances are made, or a payment is made, by the creditor, in view of the payment or the payment by the debtor, the debtor's act is in due course.² In the cases cited³ the learned Chief Judge in bankruptcy held that for a year or more before the transaction in question the London and County Banking Company had been in the habit of making advances and permitting the debtor and now bankrupt to have an open account as a contractor; 'and everyone knows,' he said, 'that such persons require frequent advances.' On several different occasions the debtor had given the bank an order upon his own debtors in respect of the advances received by him. It was held that these facts did not constitute any fraudulent preference. The reason is obvious enough: payments are made with a view to receiving further advances as occasion might require, and thus to enable the trader to continue his business. That of course is for the interest of the creditors.⁴

Nor does it of necessity make a case of fraud or an
bankruptcy that a debtor has conveyed all his property
to a creditor in consideration of an advance of only part
of the value of such property; that would be only a fact to be
considered with other facts.⁵ Indeed speaking of acts of

³ *Ex parte London Banking Co.*

⁴ *In re Colomere*, L. R. 1 C.

² In re *Colemere*, L. R. 1 Ch. 128; *Smith v. Merrill*, 9 Gray, 144.

Ex parte London Banking Co. L. R. 16
Eq. 391 ; Smith v. Merrill, 9 Gray, 144 ;
and cases in the notes here following.

ruptcy under subsection 2, of section 6, of the Bankruptcy Act, 1869,¹ Lord Coleridge, for the Exchequer Chamber, has laid it down for established law that assignments of the debtor's property were not fraudulent, and so not acts of bankruptcy, if the debtor received 'a fair present equivalent' or substantial consideration; and that the inadequacy of the equivalent or consideration would not make the assignment fraudulent as matter of law, though it would be strong evidence for an inference of fraud.²

In the case before the court it appeared that M, member of a trading firm, had given to the defendant, sued in trover by the assignee in bankruptcy of the firm, a bill of lading of brandy of the firm, for the purpose of landing and warehousing it; that the defendant had attended to this, entering the brandy, at the request of M, in his own name, and paying charges thereon amounting to £47; that afterwards, and while the bill of lading was still in his possession, an acceptance which had been given by the firm to him for £245, for the hire of a shipment, falling due, and the firm not being able to meet it, the defendant consented to take M's acceptance at seven days for the balance of account, including the hire and the £47, upon receiving M's authority to sell the brandy if the acceptance should not be paid. The acceptance was not met, and the defendant sold the brandy; for this the suit was brought, the firm having meantime been adjudged bankrupt. The transaction was in good faith, but the brandy formed the whole property of the firm. It was held that the seven days' forbearance in the last acceptance was a 'fair present equivalent or substantial consideration' for the debtor's

country a sale of the whole of a trader's stock, though for full value, is not in due course. *Walbrun v. Babbitt*, 16 Wall. 577.

¹ Bankruptcy Act, 1883, § 4, (a).

² *Philps v. Hornstedt*, 1 Ex. D. 62, Ex. Ch. luminous opinion by Lord

Coleridge, here much drawn upon; *Mercer v. Peterson*, L. R. 3 Ex. 104, Ex. Ch.; *Lomax v. Buxton*, L. R. 6 C. P. 107; *Ex parte Fisher*, L. R. 7 Ch. 636; *Ex parte Reed*, L. R. 14 Eq. 586; and *Shrubsole v. Sassams and Pennell v. Reynolds*, *supra*.

act, and therefore that the plaintiff was not entitled to recover.

Other cases were referred to by the court, in one¹ of which Lord Coleridge said, a bill of sale had been given of a trader's property to secure a past debt, and for the advance of £64, somewhat more than half the value of the property; the rule of law being declared to be that when a trader assigns his whole property, but receives in return a fair equivalent, the transaction is not void under the bankrupt law.² And in another case³ the same rule was applied upon, though the fresh advance was made in order to discharge an old debt to another creditor on a previous bill of sale, the advance being likened to a substantial exception out of the debtor's property, 'such an exception as might possibly enable him to carry on his trade with advantage.'⁴ The question is, whether the effect of the trader's pledging his property for advances is necessarily to delay his creditors. If such is not the effect, the transaction is valid though the advances bear a small proportion to the value of the debtor's property.⁵

¹ *Mercer v. Peterson*, L. R. 3 Ex. 104.

² In Lord Mansfield's time a trader committed an act of bankruptcy and a bill of sale was given by a *deed* assigning all of his property, though for a (present) valuable consideration, to a creditor. *Worseley v. de Mattos*, 1 Burr. 467, 484. This was on the ground that it destroyed his ability to continue his trade. 'It has been settled over and over,' said his Lordship in *Hassells v. Simpson*, 1 Doug. 89, note, 'that if a trader makes a conveyance of all his property, that is instantly an act of bankruptcy. It is fraudulent; it destroys the capacity of trading.' See also *Devon v. Watts*, 1 Doug. 86; *Butcher v. Easto*, ib. 295. In *Walbrun v. Babbitt*, 16 Wall. 577,

such conveyance is held not to be an act of bankruptcy in the ordinary course of business. It was not settled until the time of Lord Mansfield who at first was inclined to the contrary, that purchase for fair value of the effects of a trader, without notice, is not void, even if it be with a wrongful intent by the trader, and even if it be an act of bankruptcy and invalid as against the trader. *Baxter v. Pritchard*, 1 E. 456. That was not the first case to that effect however. *Rose v. Cock*, ib. 460, note, a few years later.

³ *Lomax v. Buxton*, L. R. 107.

⁴ Lord Coleridge, quoting the language of *Lomax v. Buxton*.

⁵ *Bittlestone v. Cooke*, 6 El. 296.

Indeed it has well been said that 'equivalent' or 'fair equivalent' is a misleading term;¹ it has been seen that if there is a further advance at the time of the debtor's transfer or payment, no question will be considered whether the advance was great or small, assuming the transaction to be genuine. If a bona fide intention existed and was promoted that is enough.² 'Equivalent' indeed does not even require the payment down of any sum of money. 'If a trader carrying on his business has something done for him which enables him to continue carrying it on, that is an equivalent.'³ It has been held however that, in the case of a conveyance of all the debtor's property to the creditor, if, in consideration of a money advance, the right is given to the creditor to seize all the debtor's after-acquired property on default of payment, including property acquired with the money advanced, the case will be different. In that case the debtor, it is said, gets no equivalent for any part of the property conveyed.⁴

There are some special aspects of the rule of advances and 'fair equivalents' which require mention here. One of the common modes of endeavoring to circumvent the bankruptcy laws is for a creditor, in an arrangement for his benefit otherwise good, to make some bargain with his debtor in regard to the debtor's property, perhaps in a mortgage, by which it is provided that in the event of the debtor's bankruptcy the creditor shall have a particular additional advantage. Property however cannot, by the law of England,⁵ be given to a man with a provision that it shall not be subject to his

¹ *Philps v. Hornstedt*, 1 Ex. D. 62, 65; *Ex parte Reed*, L. R. 14 Eq. 586.

² *Ex parte Chaplin*, 26 Ch. D. 319, C. A., Bowen, L. J.

³ *Ex parte Reed*, *supra*, Bacon, Chief Judge, quoted and adopted by the court in *Philps v. Hornstedt*, *supra*. 'It does not go directly to the creditors, but the creditors are greatly interested in the fact of the man carrying on his busi-

ness, and if the transaction enables him to do so, it cannot be said that the creditors had not some equivalent.' *Ex parte Reed*, *supra*, Bacon, C. J.

⁴ *Graham v. Chapman*, 12 C. B. 85 (under 12 & 13 Vict. c. 106, § 67). But as to this case see *Lomax v. Buxton*, L. R. 6 C. P. 107, 112, 113, 115.

⁵ *Brandon v. Robinson*, 18 Ves. 423. But see *ante*, pp. 223, 224, note.

debts;¹ much less may a provision be sustained by the event of bankruptcy a particular creditor is to be preferred over other creditors. 'A person cannot make part of his contract that in the event of bankruptcy he is to get some additional advantage, which prevents the property being distributed under the bankruptcy laws.'²

This was said of a case of a mortgage by the debtor was held to mean that if the debtor should become bankrupt certain chattels, which were not included in the deed, should become an additional security to the mortgagee for the debt. The same rule had been laid down in a case⁴ in which the owner of a patent had sold the same to another upon the undertaking by the purchaser to pay royalties to the seller. The buyer at the same time lent the seller a large sum of money, for which he was to be repaid by retaining the royalties as they became due; and if the seller should become bankrupt, or make an assignment for his creditors, the buyer was to retain all the royalties in satisfaction of the debt. The contingency of bankruptcy having happened, it was held that the buyer of the patent could retain only half the royalties.⁵

¹ 'The general distinction seems to be that the owner of property may, on alienation, qualify the interest of his alienee by a condition to take effect on bankruptcy [e. g. that in such event the property shall go over to some one else. *Brandon v. Robinson*, supra], but cannot by contract or otherwise qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors; the *jus disponendi*, which for the first purpose is absolute, being in the latter instance subject to the disposition prescribed by law.' 1 Swanst. 481, note by Mr. Swanston, adopted by Lord Hatherley in *Whitmore v. Mason*, 2 Johns. & H.

204, 210, and by Lord Justice James in the court in *Ex parte Barter*, 26 Ch. D. 510, C. A.

² James, L. J. in *Ex parte Whitmore*, 7 Ch. D. 138, C. A., quoting Lord Justice James in *Ex parte Mackay*, L. R. 10 Ch. D. 643.

³ 'It appears to me,' said Lord Justice James, 'that the attornment was a mere sham, a mere contrivance and device to give the mortgagee an additional benefit in the event of the mortgagor's bankruptcy.'

⁴ *Ex parte Mackay*, supra.

⁵ Further see *Whitmore v. Mason*, 2 Johns. & H. 204, 210; *Ex parte Barter*, 26 Ch. D. 510, C. A. 'In my opinion,' said Fry, L. J. for the

Thus far of transfers, payments, and the like, in respect of past debts; but the principle by which a fair equivalent in such cases makes the transaction good is of course applicable to the case of a transaction in which there is a transfer or payment by the debtor in respect of a debt then first created. If the transaction does not wrongfully delay creditors, if in the case of a trader it has no necessary tendency to stop his business, and especially if it is calculated to help the trader in carrying on his business, then in principle it is valid, and this without regard to the nature or the amount of the equivalent received by the debtor.

§ 6. THE SAVING: PRESSURE.

We are now brought to a special distinctive feature of the English¹ law of preference. Before the year 1869 fraudulent preference was commonly treated as an act by which the insolvent debtor made a payment, or a transfer of property, or yielded some valuable right, to a creditor 'voluntarily,' and in contemplation of bankruptcy.²

What is meant by the word 'voluntary' — for it is not used in the sense of 'without consideration' — in this rule? The answer cannot be given once for all, for this is one of the law's technical terms which underwent a change of meaning in the progress of time. It was constantly contrasted however with

in the second case, 'a power upon bankruptcy to control the user, after bankruptcy, of property vested in the bankrupt at the date of the bankruptcy is invalid.'

¹ Irish also. In re Boyd, 15 L. R. Ir. 521, C. A., preference under pressure held valid. Contra in this country, at least under the late national bankruptcy law. First National Bank v. Jones, 21 Wall. 325.

² Devon v. Watts, 1 Doug. 86; Hasells v. Simpson, ib. 89, note; Butcher

v. Easto, ib. 295; In re Inns of Court Hotel Co. L. R. 6 Eq. 82 (1868). The terms continued in use afterwards. Ex parte Craven, L. R. 10 Eq. 648 (1870); Ex parte Blackburn, L. R. 12 Eq. 385 (1871). See also Ex parte London Banking Co. L. R. 16 Eq. 391; In re Tempest, L. R. 6 Ch. 70; Ex parte Bolland, L. R. 7 Ch. 24; Ex parte Topham, L. R. 8 Ch. 614, that the question still is whether the act was spontaneous. *Infra*, p. 596.

the term 'pressure;' if the act in question was done under 'pressure' of the creditor, it was not voluntary,¹ and therefore was not within the law of fraudulent preference. Then 'pressure,' which is still a current term of the law, sides being essentially an elastic idea, has in fact undergone changes of meaning. At first it was understood in its natural sense; to prevent a transaction from being treated as invalid within the law of preference it was necessary to say something like coercion and a reluctant yielding.²

This however long since ceased to be the received meaning of the word, so much so that a single request on the part of the creditor has for many years been held sufficient; if a request is complied with, the payment or transfer has been made under pressure. It is not voluntary, and it cannot be set aside.³ 'The creditor cannot be deprived of what he has got, if he got it by asking; if he got it by the purely voluntary act of the debtor, he must lose it.'⁴ Shortly after the word 'voluntary' long ago reached the meaning of 'spontaneous.' Now it appears to be falling out of use; the difficulty as it remains, touches the term 'pressure,' a term, it has been remarked, not used in the bankruptcy statutes themselves.

Pressure however was not, and probably is not, the ground upon which a transfer or payment made upon the ground of bankruptcy might be made good; it is not the only case in which it differs with 'voluntary.' The effect of pressure is this: where there is evidence that a transfer or payment is made to a creditor

¹ According to Lord Mansfield it was not done in due course of trade if done under pressure. *Rust v. Cooper*, 2 Cowp. 629, 634.

² *Johnson v. Fesemeyer*, 3 De G. & J. 13, Lord Chelmsford.

³ *Ex parte Holder*, 24 Ch. D. 339, 340, C. A.

⁴ *In re Tempest*, L. R. 6 Ch. 70. To produce the same effect, *Ex parte Bolland*, L. R.

7 Ch. 24; *Ex parte Topham*, L. R. 10 Ch. 614; *Ex parte London & Lancashire Bank*, L. R. 16 Eq. 391. For an instance of sufficient pressure see *Ex parte Pilgrim*, 2 Ch. D. 127.

⁵ *Johnson v. Fesemeyer*, 3 De G. & J. 13; *Ex parte London & Lancashire Bank*, L. R. 16 Eq. 391; *In re Tempest*, supra; *Strachan v. Barton*, L. R. 6 Ch. 650.

on the eve of bankruptcy, voluntarily, in the language of the old law, that is, that it was, apparently, the spontaneous act of the debtor, there arises a presumption of fact that the act was done with a view of evading the bankruptcy law; and that presumption is rebutted by showing (what the law deems) pressure.¹ But in principle that presumption might be met in other ways; and so the law is declared. In a case² which arose in the Queen's Bench in the year 1865, in which an action had been brought by assignees in bankruptcy to recover back money paid to the defendant by way, as alleged, of fraudulent preference, the matter was left to the jury in this way: They were told that if the payment was in contemplation of bankruptcy and voluntary, they ought to infer that it was intended to prevent the equal distribution of the property among the creditors. But they were further instructed that if the bankrupt, though aware that bankruptcy was inevitable, and though no demand of payment had been made, paid the debt simply in discharge of the obligation he had entered into, without any view of giving a preference to the particular creditor at the expense of the rest, the payment would not be fraudulent but would stand. And this was upheld.

The court said that there was no doubt that in most cases the question of fraudulent preference would be determined by the fact that the act of the debtor was spontaneous, without pressure by the creditor; it would carry a presumption that the debtor intended to act in fraud of the bankrupt law. Hence the importance of evidence of pressure. But it did not follow that because in most cases the absence of pressure led to an inference of wrongful intent by the debtor, that circumstance was of necessity conclusive in a case where other circumstances were found, sufficient to rebut the presumption. 'For it must be borne in mind,' said Chief Justice Cockburn

¹ *Bills v. Smith*, 6 Best & S. 314, 318, Cockburn, C. J.; *Smith v. Pilgrim*, 2 Ch. D. 127, Malins, V. C. It is im-
portant to notice that a *presumption* is to be met.

² *Bills v. Smith*, *supra*.

for the court, 'that the true question in all these cases is whether the intention with which the payment was made was to defeat the operation of the bankrupt law.'¹

The Bankruptcy Act of 1883, above quoted, following the language first used in the Bankruptcy Act of 1869,² declares that any of the several acts mentioned, if done 'with a view of giving' the particular 'creditor a preference over the other creditors,' shall be deemed fraudulent and void. The words quoted are substituted for the word 'voluntarily' of the judges in the 'old law,' as the law before the statute of 1869 is often called.

What effect has been produced by the change in the terms

¹ His lordship further observed in this important case: 'The statutes relating to bankruptcy contained no provision invalidating payments made prior to the act of bankruptcy; but the courts from the time of Lord Mansfield held that if a trader in contemplation of bankruptcy, with a view to evade the bankrupt law, preferred a particular creditor to the detriment of the rest, such a preference was a fraud upon the law.' He adds that Lord Ellenborough, in *Crosby v. Crouch*, 2 Camp. 166, 168, called this subject of preference an excrescence upon the bankrupt laws (it certainly is no longer such), and that he thought that the cases had gone far enough. And after quoting Heath, J. in *Hartshorn v. Slodden*, 2 Bos. & P. 582, 585, 586, to the effect that the bankrupt has the disposition of his property until he commits an act of bankruptcy, and that unless he disposes of it in fraudem legis, his act will be good, proceeds: 'It is with reference to the intention and motives of the party making the payment that the fact of threats or importuning on the part of

the creditor becomes in the majority of cases a matter of so much importance. Not indeed that the hostile attitude of the creditor will of itself legalize the payment, if the debtor was uninfluenced thereby and the payment was made voluntarily by the debtor and with a view to prejudice his other creditors. *Cook v. Rogers*, 7 Bing. 438. The pressure becomes material because, as is said by Lord Ellenborough in *Crosby v. Crouch*, 2 Camp. 166, 169, "his demand repels the presumption that the bankrupt, upon the eve of bankruptcy, made a distinction among his creditors, and spontaneously preferred one of them to the prejudice of the rest." . . . If the act was spontaneous on the part of the debtor, and there are no circumstances to rebut the presumption which arises, . . . the jury should be told to infer that the preference thus given was fraudulent and wrongful. But if there are circumstances by which the presumption may be rebutted, these circumstances . . . are for the consideration of the jury.'

² 32 & 33 Vict. c. 71, § 92.

of the law? It was broadly urged at the bar in a recent case¹ that the effect of the statute was to do away with the whole line of decisions prior to it in regard to pressure; but the language of the act seems plain enough, and the court refused to entertain the view, holding that it was not enough that the person receiving the benefit was in fact preferred. The case was this: A broker, who was one of several trustees of an estate, holding in his sole custody, with consent of his associates, some of the trust property, misappropriated a portion of the same; and, in order to save one of his cotrustees harmless for the breach of trust, made a payment of money to him, the wrongdoer being insolvent at the time. The Court of Appeal decided that the payment was lawful.²

It would not be safe, on the other hand, to say that the law remains precisely as it stood before the year 1869, for there has in fact been a change in its language. An entirely different set of words has been used; and this fact must have some significance, though it may be that the new words are only intended to make perfectly clear what may not have been altogether clear before. Just what significance there is in the change has not been declared, though one very learned judge has said that an examination of the authorities would show that 'voluntarily' in the technical sense of the old law means the same thing as 'with a view of giving' a preference.³ But other judges have pointed to the change of language, and refused to be led away from the words of the statute by the sug-

¹ *Ex parte Taylor*, 18 Q. B. D. 295, C. A. cannot throw out of account,' said his lordship, 'the fact that a man was

² Following *Ex parte Stebbins*, 17 Ch. D. 58, C. A. In *Ex parte Taylor* Lord Esher said that the doctrine of fraudulent preference had grown up from the decisions of the judges, and that the statute was intended to codify them. Hence the words 'with a view' etc. could not be disregarded. 'You threatened with something which he would not at all like, in order to see whether he did not act with the dominant view of getting rid of that pressure.'

³ Mellish, L. J. in *Ex parte Bolland*, L. R. 7 Ch. 24.

gestion that they mean nothing that was not already settled law.¹

One question which would naturally arise, and which has arisen in litigation more than once since the statute, is whether the existence of other motives than the motive of preference would affect the transfer or payment. As the law stood before the act of 1869 it seems that the existence of some additional motive would have the effect to prevent the debtor's act from being unlawful.² And indeed since that statute Sir George Jessel has said that if the insolvent's act was done with a view to prefer the creditor, and also with some additional motive, the case might not be within the statute.³ But the learned judge observed that the additional motive might be so trifling as not to be taken into account.⁴ And this view of the law was emphasized in another case⁵ of the same year. In that case the Court of Appeal held that it was not necessary, in order to invalidate the payment or transfer, to show that the only motive was the view to a preference; enough if that was the predominant motive, for the words of the statute were, 'with a view,' not 'with the sole view.'

That the statute is to be taken in its natural sense, in the words 'with a view of giving a preference,' is strongly illustrated in another recent case.⁶ A gentleman was heavily in debt to his father-in-law and to others, and was insolvent,

¹ 'I emphatically protest against being led away from the words of the section by any argument that the standard which the legislature has laid down is equivalent to the standard of the old law.' Lindley, L. J. in *Ex parte Griffith*, 23 Ch. D. 69, C. A.

² *Ex parte Blackburn*, L. R. 12 Eq. 364; *Ex parte Topham*, L. R. 8 Ch. 614; *Ex parte Hill*, 23 Ch. D. 695, C. A.; *Ex parte Griffith*, 23 Ch. D. 69, C. A.

³ *Contra* in the United States. *Denny v. Dana*, 2 Cush. 160; *Forbes v. Howe*, 102 Mass. 427.

⁴ *Ex parte Griffith*, 23 Ch. D. 69, C. A.

⁵ *Ex parte Hill*, *supra*, overruling the language of the Chief Judge in *Ex parte Blackburn*, L. R. 12 Eq. 364, as quoted and approved in *Ex parte Topham*, L. R. 8 Ch. 614.

⁶ *Ex parte Lancaster*, 25 Ch. D. 311, C. A.

though he had committed no act of bankruptcy. The father-in-law brought suit, after certain questionable transactions, and the son-in-law failed to appear, and allowed judgment to go against himself by default. Execution was issued and satisfied; and it was now contended for the trustee in bankruptcy afterwards appointed that the conduct of the debtor amounted to giving a preference. But the court held the contrary.

Lord Justice Cotton said that the circumstances of the case looked indeed suspicious; the debtor had been sent to consult with the creditor's solicitor, and the creditor, after consulting with the same solicitor, had thereupon brought the suit. It was not however for the court to consider what the creditor's object was, but whether the debtor acted as he did with a view to giving a preference; and it was not enough to show that the debtor did not enter an appearance to the suit in question, and that he suffered judgment to go by default. It must be shown that his conduct was with a view to a preference; and that was not shown.¹

It appears to be a proper test of the validity of a payment made by an insolvent debtor to ask a jury the following question; whether the debtor, when he made the payment, was unable to pay his debts as they became due, from his own moneys, and made it with a view of giving a preference to the creditor.² The latter clause of the question would seem to be open to the objection in a jury trial, which would not apply to a trial of the facts by a judge, that it does not call attention to the subject of pressure and its relation to the result. But in the case just cited the question stated was regarded sufficient in a jury trial; and a further question which had been put, whether the payment was made voluntarily and

¹ The debtor had testified that he did not think that his father would go to extremes after the suit and seize his property; and this was believed by the court.

² *Ex parte Bolland*, L. R. 7 Ch. 24.

without real pressure, bankruptcy being reasonably i was held, in connection with the answer given to question, misleading and improper. The first part of the first question had been answered in the affirmative, the second part in the negative.¹

It is not necessary that the pressure should be by an immediate creditor to whom the payment or transfer was made, or by his agent. A request made by a surety for money for the payment of which he is ultimately liable, to be paid over by the debtor to the creditor prevents a payment made accordingly from being a voluntary payment, as a request by the creditor himself.²

It is not clear that a payment or transfer not made in pure gratitude would necessarily be valid. Suppose a debtor's motive is not gratitude, but an expectation that the act will turn out to his benefit, and that negotiations are carried on and consummated between him and the creditor upon that footing, the creditor however making demands but remaining passive throughout; could a preference be set aside? It is not probable that such a case would occur very often, but the evidence brought forward may sometimes make one.

A case³ in point arose under the Bankruptcy Act of 1869. It was to the following effect: A creditor had recovered judgment (for upwards of £50) against his debtor, and had

¹ Mellish, L. J. after saying that if there had been such a demand as partly influenced the bankrupt in making the payment, so that it was not entirely voluntary, the payment was not a fraudulent preference, said: "The words 'voluntarily' and 'without real pressure' make this question one which would tend to mislead the jury and to induce them to believe that, if there was not what they considered real pressure, although there was such a demand as to prevent the payment being made with a view to creditor preference over the other creditors, then it was a fraudulent preference. I think the finding on this issue must be taken as decisive."
² *Edwards v. Glyn*, 2 El. & B. 667.
³ *Ex parte Pearson*, L. R. 10, 667.

upon a lot of the debtor's horses. Before sale the debtor, being insolvent, to the knowledge of both parties, agreed with his creditor to give to him the horses in satisfaction of the debt; but the horses were left with the debtor upon his undertaking to pay for the use of them. A few days later the creditor took them away and sold them for about the amount of the debt. Upon the same day the debtor filed a petition for liquidation and was afterwards adjudged a bankrupt. The court held the transaction a fraud upon the bankrupt laws; Lord Justice James further holding that there had been a fraudulent preference. His lordship said that the act was no doubt done by the debtor, not out of pure gratitude, but with a view to his own benefit; not differing in that respect from the ordinary case of fraudulent preference. But Lord Justice Mellish doubted.

Pressure does not exist where, after the debtor's voluntarily putting his property into the hands of a creditor for some special purpose of custody, the creditor refuses to keep it except on the terms of paying himself out of it. A debtor drew his money out of bank, and sent it to his accountant, to whom also he was a debtor. He did this to prevent the money from being taken on process issued by another creditor. The accountant took the money back, saying that he would not accept it unless the debtor would permit him to pay himself out of it. This was finally agreed upon, the money received, and the appropriation made. There having been no other inducing pressure, and the debtor having gone into bankruptcy directly, the court held that there was no pressure, and that the money must be repaid to the trustee in bankruptcy.¹

¹ Ex parte Halliday, L. R. 8 Ch. 283. 'As a matter of fact,' said Mellish, L. J. 'I should infer not only that the payment was not made, wholly or in part, in consequence of the pressure of the former demand, but that the debtors did not intend to make any payment at all so long as they were able to go on with their business, and that when they found it impossible to go on,

Again a threat on the part of the creditor to bring the debt is not paid, may or may not amount to pressure according to circumstances. If the threat is followed by the payment or other act of the statute, the inference will be strong, and indeed, if not controlled by other evidence, it will be irresistible that the act was done with a view to preference. As has just been intimated, the inference may be corrected. Thus, it is laid down that a threat by the creditor, in the situation of the insolvent, to sue if not paid or to sue for the debt cannot be considered as having any influence upon the insolvent on the eve of becoming a bankrupt, and hence cannot be considered as pressure so as to make good security given thereafter. Pressure must be real, and bona fide.¹

It is clear indeed that actual pressure in the ordinary sense will not necessarily save the transfer or payment; there must have been fraud (or some other illegal act) on the part of the creditor. Thus a creditor suggested to his debtor to sell the goods of *others* on credit, and with the proceeds of the sale to pay him; and this was done under pressure. The debtor became bankrupt, the transaction was annulled.² The creditor's conduct was a plain fraud upon the other creditors. Again a particular case may fall under some special provision between the parties to the transaction in question, correcting the whole effect of pressure. Thus an insolvent company formed under the Companies Act of 1862, pressed by its directors, gives to him a security for payment of the debt, the director being aware of the company's insolvency. The transaction may be set aside, on the ground that a director cannot in such a case exercise legal pressure; he presses himself to pay himself. He should first re-

they gave a preference to this particular creditor.'

¹ Ex parte Hall, 19 Ch. D. 580, C. A. Jessel, M. R.: The pressure 'was all a sham. What pressure can be produced on a man who is going to become a

bankrupt in a week, by your saying you will bring an action against

It might be different if the creditor did not know the state of his affairs

² Ex parte Reader, L. R. 2

³ Gaslight Improvement

Again the rule of the validity of payments or transfers made by insolvent debtors under pressure of creditors has some important limitations. One of these is that where an assignment of part of the debtor's property is made to a trustee for a special class of creditors, no amount of pressure can make the act valid against the excluded creditors.¹ In the case cited it was declared that while a creditor might lawfully and successfully importune his debtor for payment, no creditor or creditors, by any amount of importunity or even coercion on the one hand or largess on the other could lawfully and successfully obtain an assignment of any part of the debtor's property for distribution among a favored class of creditors, whether trade creditors, private creditors, domestic creditors, stock exchange creditors, or others.²

The effect of pressure is not avoided by the fact that some formality of making title, in a case of transfer of property, was not gone through with until some time after the pressure. In a case³ decided shortly after the Act of 1869 a creditor of a trader, finding that the trader was not carrying on his business prudently, called for payment; and it was arranged that a certain piece of property of the debtor should be taken as part satisfaction. A solicitor was, several weeks afterwards, instructed to draw the necessary conveyance, but owing to his illness nearly two months more elapsed before this was done. In the following month the debtor filed a petition for liquidation. The court held the preference valid.⁴

The effect of pressure is not done away necessarily by the fact that the assignment or transfer is made by an instrument

rell, L. R. 10 Eq. 168. 'Whom is he to press? Here are five directors, all of whom are creditors. Against whom is the pressure to be directed? The only answer is themselves; that is, they are to press themselves to pay themselves.' Romilly, M. R.

¹ Ex parte Saffery, 4 Ch. D. 555, C. A.

² Ib. James, L. J.

³ In re Tempest, L. R. 6 Ch. 70.

⁴ Compare the like case of mere preference, ante, pp. 581, 582.

giving the creditor a right to take after-acquired property on default of payment of an advance. If the effect would prevent the debtor being a trader from deriving any advantage whatever from the further advance, then indeed the act would be an act of bankruptcy, and upon an adjudication of bankruptcy based upon a petition against the debtor, the title would relate to the act of bankruptcy and defeat the creditor's claim notwithstanding the pressure.¹ But it would not be an act of bankruptcy where the trader receives the full benefit of the sum advanced, as where it is applied at once in time to satisfy the demand of another pressing creditor.

If the debtor does not act under the influence of the creditor's pressure, the case clearly stands as if there had been not the kind.² In a recent case³ it appeared that there had been a discussion between the insolvent and one of his creditors in which the creditor said in effect, 'Can't you give me a preference?' and asked the debtor to assign certain debts to him as security. The debtor refused at the time to do so, but afterwards, just on the eve of signing his petition in bankruptcy, he did assign the debts referred to to the creditor. The court held this a case of unlawful preference; concluding that the debtor's mind had been influenced, not by the creditor's demand, but by the debtor's own desire to give a preference.

§ 7. THE SAVING: THE AMERICAN STATUTES AND THEIR MEANING.

The insolvency statute of Massachusetts, and that of other states render alienations, with a view to preference, void as to persons who receive the property 'having reasonable

¹ *Graham v. Chapman*, 12 C. B. 85, 13 L. J. 100; *Jervia, C. J.* (but see *Lomax v. Buxton*, L. R. 6 C. P. 109, 112); *Hutton v. Cruttwell*, 1 El. & B. 15.

² *Hutton v. Cruttwell*, *supra*.

³ *Cook v. Rogers*, 7 Bing. 48; *v. Smith*, 6 Best & S. 314, 320 p. 592.

⁴ *Ex parte Griffith*, 23 Ch. C. A.

to believe' the debtor to be insolvent or to be in contemplation of insolvency, fraudulent, and his act to be 'in fraud of the laws relating to insolvency;' ¹ and if an alienation 'is not made in the usual and ordinary course of business of the debtor, that fact shall be prima facie evidence' that the creditor had such cause of belief. ² This by plain inference saves creditors and claimants (1) who receive property from their debtors (though turned over with a view to preference) without reasonable ground to believe the debtor insolvent or in contemplation of insolvency and that his act was in fraud of the law, ³ (2) who have taken in the usual course of the debtor's business. ⁴

Some of the statutes, as e. g. the statute of Kentucky, ⁵ make a partial or particular saving; others omit all saving. It is apprehended however that the saving of the Massachusetts Act would be treated everywhere as belonging to the construction of the statutes, in the absence of language inconsistent with it.

The provision in the American statutes making it necessary to a fraudulent preference that the debtor should be insolvent or in contemplation of insolvency has often come before the courts for construction. ⁶ In the case first cited a debtor's stock in trade had been attached by several of his creditors, the debtor being in fact insolvent at the time. On the same day he assigned to another creditor choses in action as secu-

¹ This is put somewhat broadly so as to cover the common features of §§ 96 and 98.

² This applies as well to transfers to pre-existing debtors as to other cases. *Metcalf v. Munson*, 10 Allen, 491.

³ Intent to prefer is not enough under this act, though the debtor may have been known to be insolvent. *Kingman v. Tirrell*, 11 Allen, 97, 100. See *Lothrop v. Highland Foundry Co.*, 128 Mass. 120, 124. .

⁴ The saving of payments or transfers not exceeding \$25 may also be noticed. § 97.

What transactions are in the due course of business see *Nary v. Merrill*, 8 Allen, 451, mortgage of homestead by a millwright, not in due course.

⁵ Ante, p. 573.

⁶ *Gorham v. Stearns*, 1 Met. 366; *Crowninshield v. Kittridge*, 7 Met. 520; *Tapley v. Forbes*, 2 Allen, 20; *Kingman v. Tirrell*, 11 Allen, 97.

rity for debts actually due and for liabilities incurred by the debtor did without intending to take the benefit of the insolvency Act which had just been passed, and in fact not even knowing of the existence of the statute, the following day however the debtor applied for the benefit of the statute; and assignees were appointed who were to recover the choses in action thus assigned. It was held under a statute making it necessary that the preference be made in contemplation of insolvency, that there was no fraudulent preference.

In another case¹ S mortgaged household furniture to a defendant to secure payment, six months later, of a debt S owed to P, the mortgage being fraudulent against the creditors of S. Of this mortgage P had no knowledge. Within the six months the defendant sold the property and applied the money on the debt due to P. Afterwards S applied for the benefit of the insolvent law, an assignee was appointed, and the assignee brought suit to recover the proceeds of the sale of the mortgaged goods. It was held that P was entitled to receive the money, and therefore that the defendant was not liable.²

That the preferred creditor had reasonable ground to believe that his debtor was insolvent may be shown by evidence which would put a prudent man upon inquiry.³ It may also be shown by notorious facts of the neighborhood.⁴ That

¹ *Crowninshield v. Kittridge*, 7 Met. Mass. 245; *Beals v. Quinn*, 10 Met. 520.

² See *Thomas v. Goodwin*, 12 Mass. 140; *Hutchins v. Sprague*, 4 N. H. 469.

³ *Merchants' Bank v. Cook*, 95 U. S. 342; *Dutcher v. Wright*, 94 U. S. 553; *Buchanan v. Smith*, 16 Wall. 308; *Toof v. Martin*, 13 Wall. 40; *Wilson v. Bank*, 17 Wall. 487; *Scammon v. Cole*, 5 N. B. R. 263; *Ecker v. McAllister*, 54 Md. 362; *Parsons v. Topliff*, 119

⁴ *Denny v. Dana*, 2 Cush. 262; *Kilburn*, 3 Gray, 594; *Bartlett v. Kilburn*, 3 Gray, 594; *Bartlett v. Kilburn*, 3 Gray, 594; *Simpson v. Kilburn*, 3 Gray, 594; *Metcalf v. Kilburn*, 3 Gray, 594; *Larkin v. Hall*, 16 Vt. 597; *Wager v. Hall*, 16 Vt. 597. The preferred creditor need not be guilty of *fraud*. *Crafts v. Kilburn*, 99 Mass. 535.

Massachusetts case¹ it was held proper to show that the debtor was engaged in a business known in the neighborhood to be ruinous. Whether the creditor had such cause or not depended, it was said, upon the credit of the debtor at the place of his business; if the debtor was generally known to be engaged in a losing business, that might have some tendency to prove that he was insolvent and that the creditor had the means of knowing the fact. That the conveyance by the debtor was out of the course of the debtor's business, if unexplained, also shows in Massachusetts and elsewhere that the creditor had reasonable ground to believe the debtor to be insolvent;² this by the very terms of the statute.³

It has been declared to be extremely difficult to give a general definition of the word 'insolvent,' or 'insolvency,' for what, it is said, would amount to insolvency in one class of cases might fall short of it in another; what would be requisite to constitute 'insolvency' would be very different in the case of a banker or merchant from that requisite in the case of a farmer or one not engaged in active pursuits.⁴ In the case cited the following instruction in effect had been given in regard to certain debtors who were manufacturers and traders: If when the debt was paid to the defendant the debts of the (now) insolvents were so large and numerous that they

¹ *Denny v. Dana*, *supra*.

² *Perry v. Hadley*, 148 Mass. 48, 50; *Stevens v. Pierce*, 147 Mass. 510; *Bernheim v. Christel*, 76 Cal. 567; *Godfrey v. Miller*, 80 Cal. 420; *Washburn v. Huntington*, 78 Cal. 573; *Goldsworthy v. Roger Williams Bank*, 15 R. I. 586; *Mathews v. Riggs*, 5 New Eng. R. (Maine) 863. Further as to reasonable ground, *Grant v. First National Bank*, 97 U. S. 80; *Stucky v. Masonic Sav. Bank*, 108 U. S. 74; *Buffum v. Jones*, 144 Mass. 29; *Abbott v. Shepard*, 142 Mass. 17; *Cozzens v. Holt*, 136 Mass. 237; *Holbrook v. Johnson*, 7 Cush. 136; *Otis v. Hadley*, 112 Mass. 100;

King v. Storer, 75 Maine, 62; *Merrill v. McLaughlin*, *ib.* 64; *ante*, p. 8, note. The test is not belief or knowledge, but ground for belief. *Larkin v. Batchelder*, 56 Vt. 416; *Purinton v. Chamberlain*, 131 Mass. 589, 590; *Merchants' Bank v. Cook*, 95 U. S. 342; *Rogers v. Palmer*, 102 U. S. 263; *Dutcher v. Wright*, 94 U. S. 553; *Buchanan v. Smith*, 16 Wall. 308.

³ *Ante*, p. 575; *Meserve v. Wald*, 75 Maine, 483.

⁴ *Thomas, J.* in *Lee v. Kilburn*, 3 Gray, 594, 599. See also *Toof v. Martin*, 13 Wall. 40, *Field, J.*

could not pay the same as the debts became due, in ordinary course of business, as men in similar business do, and their inability was so great as to compel them to stop business, they were insolvent within the meaning of the statute.

This, in the last particular, was held inaccurate; a man might be insolvent though he was not compelled to stop business. What was meant by insolvency in the case of a trader, as an abstract proposition, could be stated only in general terms; a trader might be said to be insolvent when he is not in a condition to pay his debts in the ordinary course of business as persons carrying on trade usually do.¹ The English definition of it may be observed, appears to be intended to define insolvency generally; an insolvent person is in the provision respecting fraudulent preference spoken of, in general, as 'any person unable to pay his debts as they become due, from his own money.' This was in substance the definition given to the term insolvent in the late national Bankruptcy Act.² A man may however be treated as insolvent though he has ample to pay all his debts if still it is all in his pocket or on his person.³ It is desirable however to pursue this question as the subject probably will be disposed of by national legislation before long.

§ 8. CONSEQUENCES OF FRAUDULENT PREFERENCE

Under the English bankruptcy law the primary civil consequence of declaring a particular preference fraudulent is

¹ Bayly v. Schofield, 1 Maule & S. 338; Shone v. Lucas, 3 Dowl. & R. 218; 2 Bell's Com. 167; Herrick v. Borst, 4 Hill, 650; Thompson v. Thompson, 4 Cush. 134. whose business affairs are in question, and who is unable to pay his debts as they become due, in the ordinary course of business transactions.' See also Wager v. Toof, 16 Wall. 584; Toof v. Martin, 16 Wall. 584; Vennard v. McConnell, 1 Allen, 562; Barnard v. Crosby, 6 Allen, 331.

² Ante, p. 571. Further see Munson v. Ellis, 58 Mich. 331; Otis v. Hadley, 112 Mass. 100.

³ Dutcher v. Wright, 94 U. S. 553. Clifford, J.: 'Insolvency in the sense of the Bankrupt Act means that a party is unable to pay his debts as they become due, in the ordinary course of business transactions.' See also Wager v. Toof, 16 Wall. 584; Toof v. Martin, 16 Wall. 584; Vennard v. McConnell, 1 Allen, 562; Barnard v. Crosby, 6 Allen, 331.

⁴ Bartholomew v. McKinnon, 1 Allen, 567; s. c. 2 Allen, 44 p. 195.

enough ; the transaction in which the preference was made is overturned, and the property goes to the trustee for distribution as if he had received it in the first place. There is, it should seem, no forfeiture of the creditor's rights ; though the debtor may thereby lose his discharge. The American statutes of insolvency are of the same effect. The statutes relating to preferences in assignments for creditors however vary considerably, as we have seen ; some of them declaring the assignment itself void by reason of the preference,¹ others going no further than to make the preference invalid, without disturbing the assignment.² In any case the assignee in insolvency can treat the unlawful preference as void at law ; he need not first have the debtor's conveyance set aside by legal proceedings.³

And not only must the creditor who has received the improper preference make return, an agent of the debtor, holding the debtor's funds and paying them over to a particular creditor by direction of the debtor, with knowledge that the debtor was thereby making a fraudulent preference, is, it seems, also liable.⁴ This appears to be on the ground of participation in the fraud. The agent ought rather, when in such a predicament, to pay the fund over to his principal and leave him to act alone in the matter.

¹ Ante, p. 566 ; *Landeman v. Wilson*, 29 W. Va. 702.

² *Ib.* ; *Grubbs v. King*, 117 Ind. 243 ; *Meinhard v. Strickland*, 7 S. E. R. (S. Car.) 888.

A previous judgment is not necessary to enable the assignee to recover the property. *Cerf v. Phillips*, 75 Cal. 185.

³ *Freeland v. Freeland*, 102 Mass. 475 ; *Thomson v. O'Sullivan*, 6 Allen, 303, 304 ; *Gibbs v. Thayer*, 6 Cush. 30 ; *Dwinel v. Perley*, 32 Maine, 197. See *Milliken v. Hathaway*, 148 Mass. 69.

But the assignee cannot transfer his right of electing to avoid the transaction

before he has himself distinctly manifested such right. *Morgan v. Abbott*, 148 Mass. 507 ; *Freeland v. Freeland*, supra ; *Tuite v. Stevens*, 98 Mass. 305.

For many purposes the fraudulent preference makes the transaction voidable only. See *Smith v. Brainerd*, 87 Minn. 479.

⁴ *Ex parte Helder*, 24 Ch. D. 339, C. A. The fact that the agent himself receives funds from another for his insolvent principal does not amount to a preference by the latter ; the agent's holding is the principal's, and not his own. That is, there has been no payment or transfer by the insolvent. *Ib.*

Next in regard to the title of a trustee in bankruptcy in respect of property which has been the subject of a fraudulent preference. It must be observed that the effect of bankruptcy is not per se to confer ownership upon the trustee. It has acceptance of office by the trustee any such effect upon title to the property made by the debtor's transfer until it is properly divested by the trustee; and the election must be manifested by some clear and significant act. It is not enough to bring an action for the recovery of the goods; for the action may be abandoned at any time. There may however be recitals upon the record of such an action as to make an election.²

It has been seen that the title of a transferee from a bankrupt who afterwards, within the time named in the statute, comes bankrupt may be rendered invalid by the doctrine of relation, if the bankruptcy was not adjudicated on petition by the debtor.³ This doctrine of relation has no application to the law of preference, and the title or claim of the transferee does not turn upon it.⁴

The case just referred to was an action by an assignee in bankruptcy against one who had taken possession of the goods of the bankrupt under a bill of sale. At the time of the sale the goods were property of the bankrupt; and the bill of sale was given under circumstances, it was urged, constituting a fraudulent preference. The jury had found that there was such a preference, and a verdict was entered in favor of the plaintiff, but with leave to move to enter a verdict in favor of the defendant; and the judgment of the Exchequer Chamber reversing that of the Exchequer,⁵ was that the verdict should stand as entered. The decision in the lower court had been based upon the ground that the plaintiff's title depended

¹ *Newnham v. Stevenson*, 10 C. B. 713.

² *Clough v. London Ry. Co.* L. R. 7 Ex. 26, Ex. Ch.; vol. 1, p. 487, note.

³ *Jones v. Harber*, L. R. 6 Ex. 605, ante, p. 605.

⁴ *Marks v. Feldman*, L. R. 11 Ex. 275 Ex. Ch.

⁵ L. R. 4 Q. B. 481.

its relation back to the sale made to the defendant, and that there was no such relation, the bankruptcy having been adjudicated upon the debtor's own petition. This was now held to be an erroneous view. Relation had nothing to do with the plaintiff's right of action. There had been a preference, and afterwards, within the period of the statute, the debtor had become bankrupt; that was enough.¹ And it made no difference that the goods had been converted into money by the defendant.²

§ 9. ACTS OF BANKRUPTCY.

To the foregoing it is proper to add : —

By the English Bankruptcy Act, 1883, section 4,³ a debtor⁴ commits an act of bankruptcy in each of the following cases : —

(a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally :

(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof :

(c) If in England or elsewhere he makes any conveyance or transfer of his property, or any part thereof, or creates

¹ Kelly, C. J.: 'Except so far as it may or may not be an act of bankruptcy under the provisions of the bankruptcy statutes, the doctrine of relation has no application to a fraudulent preference. If a man at a time when he contemplates bankruptcy delivers goods or money into the hands of a creditor whom he intends to benefit, that transaction is perfectly valid between the parties ; but if bankruptcy supervenes, and there is an adjudication against the transferrer or donor, it is a fraudulent preference and invalid as against the assignees, not under any express provision of the bankruptcy laws but as

contrary to the spirit and principle of those laws. Section 67 of the Bankruptcy Act, 1849, may therefore be dismissed from consideration . . . ; for it is not as an act of bankruptcy that this transaction was invalid, but simply as a fraudulent preference ; as to which the doctrine of relation has no application.'

² *Ib.*

³ 46 & 47 Vict. c. 52. Comp. Bankruptcy Act, 1869, § 6.

⁴ The older acts related to traders. 12 & 13 Vict. c. 106, § 67 ; *In re Colmera*, L. R. 1 Ch. 128.

any charge thereon which would under this or any other act be void as a fraudulent preference if he were adjudged bankrupt:

(d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling place, or otherwise absents himself, or begins to keep house:

(e) If execution issued against him has been levied by seizure and sale of his goods under process in an action in any court, or in a civil proceeding in the High Court:

(f) If he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself:

(g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained:

(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

Excluding clause (d),¹ personally intended fraud is not

¹ See ante, p. 381, acts 'naturally innocent'; post, pp. 618-627.

necessary to an act of bankruptcy. When the necessary facts appear, there is fraud, whatever the motive of the debtor.¹ This has been very distinctly laid down. It is declared in substance, that the effect of the transaction is ordinarily the thing to be considered; if a man take from an embarrassed debtor a conveyance intended to withdraw and withdrawing the debtor's property from the reach of creditors, and bankruptcy follow, the transaction is not only void under the bankruptcy law, it is fraudulent also, 'whatever may have been the view of those who were engaged in the transaction that it might be the best thing for the debtor, or that it might afford an effectual way of paying the creditors.'² One or two

¹ See *Castleberg v. Wheeler*, 10 Cent. R. (Md.) 556; *Ex parte Chaplin*, 26 Ch. D. 319, C. A., *infra*. Preference, as we have seen, must be actually intended. *Ante*, p. 579. Secus of fraud here as well as elsewhere.

See *ante*, p. 6; *infra*. It may very well be that for the purpose of refusing the debtor a discharge, or afterwards to plead discharge, as also for purposes generally of a criminal nature, personal intent may be necessary. *Wolf v. Stix*, 99 U. S. 1; *s. c.* 96 U. S. 541; *Hennequin v. Clews*, 111 U. S. 676; *Strang v. Bradner*, 114 U. S. 555; *ante*, p. 8, note, p. 377, note. But that is a different thing from the question whether the transaction was fraudulent for the purposes of administering the property, as was expressly pointed out by the court in *Wolf v. Stix*, *supra*. *Waite, C. J.* (after saying that personal fraud is necessary to prevent a debtor from having his discharge in bankruptcy): 'Clearly it [the definition of the kind of fraud here meant by the statute] does not include such fraud as the law implies from the purchase of property from a debtor with the intent thereby to hinder and delay his creditors in the

collection of their debts.' It is to be remembered that this work treats only of the civil administration of the law of fraud.

² *Cotten, L. J.*, in *Ex parte Chaplin*, 26 Ch. D. 319, 331, C. A., *ante*, p. 7, note.

It may also be observed that this part of the bankruptcy statutes relating to fraudulent conveyances, etc., which immediately answers to the statute of 13th Elizabeth (for which reason it has been considered in connection with that statute, *ante*, pp. 380, 381) has always received the same construction as that stated in the text. Before the statute of 1869 the bankruptcy law had declared to be acts of bankruptcy conveyances made 'with intent to defeat or delay creditors,' which expression the courts always treated as used in a technical sense, and not as meaning personal intention. *In re Wood*, L. R. 7 Ch. 302, 307, *Mellish, L. J.*; *In re Moroney*, 21 L. R. Ir. 27, 46, *Lord Ashbourne, C.* See also *Wolf v. Stix*, 99 U. S. 1, *Waite, C. J.*, for the court, distinguishing the matter of fraudulent conveyances. The (English) statute of 1869 left out the words 'with intent' and spoke of 'con-

illustrations, relating to the subject of clause serve to show the substantial identity of the legal character of fraud under that clause with that under the statute of 13th Elizabeth : —

Under a very old provision of the bankruptcy law, an alienation, for full value even, by a debtor in contemplation of bankruptcy may be impeached by showing that the property has remained in the 'reputed ownership' of the debtor, with the consent of the creditors to the bankruptcy.¹ The analogy to the law of fraudulent conveyances under the statute of 13th Elizabeth is enough; and indeed, as might be expected, the same difficulties beset the cases under the bankruptcy law as those under the statute of Elizabeth, such as the difficulty of determining whether the possession has really been retained.

In the case² just referred to, the bankrupt had given a bill of sale, for value but not full value, to one of his creditors of the effects in a certain inn which had been kept by the bankrupt. The property remained indeed in the bankrupt's possession; but the Bills of Sale Act, under which the objection arose, avoided sales where the property remained in the reputed ownership of the vendor at the time of the bankruptcy.

conveyances fraudulent against creditors,' the words 'with intent' being considered misleading. 'These first words,' said Mellish, L. J., *ut supra*, 'have been left out because there is often, in fact, no such intent. . . . The words "with intent to defeat or delay" have been left out as superfluous and misleading.' And to this Lord Ashbourne adds: That language 'means that, according to bankruptcy law, you should consider the effect and spirit of what is done, and that the court is not to be fettered by having to find a state of facts which may not exist at all.' In *re Maroney*, *ut supra*. See also the same case at p. 59, Pallett, C. B., to the same

effect, distinguishing cases under (d) as of acts 'naturally innocent.'

¹ *Shrubsole v. Sussams*, 1 N. S. 452; *Ex parte Chaplin*, 1 D. 319, C. A.; *Corliss v. Jewell*, 1 Minn. 364. Comp. however *Shrubsole v. Sussams*, 91 U. S. 114. See Black, *supra*, 1 C. P. D. 265, that cases of reservation of rights in favor of the debtor in such cases fall under the objection.

The subject of 'reputed ownership' runs back to the statute of 21 James I. 19. See *Ryall v. Rolle*, 1 Atk. 1, Lee, C. J. referring to the principle, 1 Ves. 348.

² *Shrubsole v. Sussams*.

with the consent of the true owner. In regard to this it appeared that the creditor, the true owner, had sent a person to the inn to paint out the debtor's name, and that the creditor himself went there shortly before the bankruptcy and arranged with the debtor to continue upon the premises to carry on the concern for him. The creditor left the bankrupt in possession to continue the business until a purchaser could be found. The court held that it was for the jury to say whether there was fraud or not.¹

In some cases the facts under which the possession was retained may show fraud as matter of law, and not merely point to fraud as matter of fact. This will be the case when there is any secret arrangement or other act the necessary effect of which is to defeat or delay creditors. In a recent case² it appeared that a trader in embarrassed circumstances assigned all his property in July, 1882, to a creditor in alleged consideration of a release by him of a debt of £327, less than half of which however was then due. The real consideration was a release of the debt and a secret agreement between the parties that the creditor should undertake the payment of the debtor's debts, at least his trade debts. On the same day the debtor entered into a written agreement with the creditor by which he was to manage the business as the creditor's servant at a salary. The creditor paid some of the debts, and the debtor carried on the business as before, in his own name, though in fact under the orders of the creditor. None of the other creditors knew anything about the special agreement. In March, 1883, the debtor became bankrupt; nearly all the trade debts having been paid by the creditor. It was held that the assignment was void against the trustee in bank-

¹ Willes, J. : 'I adhere to what I said in *Pennell v. Reynolds*, 11 C. B. N. S. 722, that an assignment by a trader of all his property and effects for a present advance of part of their value is not necessarily an act of bankruptcy ; it is for the jury to say whether under all the circumstances the effect of the assignment is to defeat or delay creditors.'

² *Ex parte Chapin*, 26 Ch. D. 319, C. A.

ruptcy, on the ground that its necessary effect was to defeat or delay the other creditors; there being no means by which they could compel performance by the creditor of his agreement to pay the debts.

The effect of the transaction, as was observed by Lord Justice Cotton, was to withdraw all the property of the debtor from the reach of the creditors, by a deed kept secret from them, thus preventing them from enforcing their legal rights. If however the agreement had been open, on the face of the assignment, so that the creditors could have made use of the debtor's name for the purpose of enforcing the special agreement, the case, his lordship said, might have been different.¹ There is reason to think that our best American authorities would not make this concession, unless the letter of the statute required;² under the general statutes against fraudulent conveyances such agreement would make a plain case, in this country, of intent to defraud.³

Under earlier legislation it had also been held that an assignment of property by a trader which, if acted upon, must necessarily prevent him from carrying on his business, and so delay or defeat his creditors, was an act of bankruptcy, wholly irrespective of any fraud.⁴ It followed that an act of the kind was not to be deemed fraudulent because it was an act of bankruptcy. The result of this was that the assignees in bankruptcy could not claim property of the bankrupt which he had conveyed by an act of bankruptcy, simply because the conveyance was such an act. Their right depended upon their having acquired a title to such property under the bankruptcy, or upon the existence of fraud in the conveyance.⁵

In the case just cited a trader had assigned all his property under pressure to the plaintiff, a creditor of his, without fraud

¹ Lord Justice Fry well considered the case within the statute of Elizabeth.

² See ante, pp. 263, 264.

³ *Ib.*

⁴ *Young v. Fletcher*, 3 H. & C. 732; *Jones v. Harber*, L. R. 6 Q. B. 77.

⁵ *Jones v. Harber*, *supra*.

and without intent to prefer. The debtor was insolvent at the time and shortly afterwards was adjudged a bankrupt, but upon his own petition. The assignees in bankruptcy got hold of the property assigned to the plaintiff and claimed it; whereupon the plaintiff sued them for conversion, and had judgment. The court said that the assignment to the plaintiff was indeed an act of bankruptcy, but as the debtor had been adjudged bankrupt upon his own petition, there could be no relation of title, in favor of the defendants, back to the act of bankruptcy;¹ and as there had been no fraud or intent to prefer, the defendants could not prevail in the suit. That is, they had acquired no title, and they had no right to have the plaintiff's title set aside.

This decision was based upon a case in the Exchequer.² In that case a bill of sale had been executed by a debtor within twelve months before he was adjudged bankrupt, but in pursuance of a valid agreement made more than twelve months before the adjudication; the old law permitting conveyances made twelve months before adjudication to stand, if not otherwise objectionable. The court held that the transfer must be considered as relating back to the day on which it was agreed that it should be made, and therefore that it could not be treated as an act of bankruptcy, and could only be avoided on the ground of fraud.³

It is probable that the same doctrine would apply to the Bankruptcy Acts, 1869 and 1883, both of which contain provisions that a debtor may be declared bankrupt on the ground, *inter alia*, that he has made a fraudulent gift, delivery, or transfer of property. A claim by the trustee in bankruptcy

¹ See *Shrubsall v. Sussans*, 16 C. B. N. S. 452; *Marks v. Feldman*, L. R. 5 Q. B. 275, Ex. Ch., reversing, but not on this point, L. R. 4 Q. B. 481.

² *Mercer v. Peterson*, L. R. 2 Ex. 304.

³ The case was affirmed by the Ex-

chequer Chamber, L. R. 3 Ex. 104, but on a different ground; but the court in *Jones v. Harber*, *supra*, considered that the ground taken by the Court of Exchequer had not been rejected.

would rest either on title acquired by him under the
tion or on fraud in the transfer; so indeed Mr. Just
burn intimated in the case above referred to.¹ If
does not relate back to the act of bankruptcy, then
tee's claim must rest upon fraud in such act.

¹ Jones v. Harber, L. R. 6 Q. B. 77.

III. EVASION OF PROCESS.

CHAPTER XXV.

BANKRUPTCY: NE EXEAT: ATTACHMENT.

§ 1. INTRODUCTORY: BANKRUPTCY.

CERTAIN aspects of evasion of process have been considered in other connections, because they belonged to the subjects then under consideration. The statute of 13th Elizabeth, in rendering void conveyances in fraud of creditors, embraces conveyances made in order to evade the process of creditors; and evasion of process was therefore a necessary part of the treatment of that statute. Here however a different thing is to be taken in hand; the subject now to be considered is not that of *conveyances* with intent to defraud, but simply evasion of process with such intent; and that may be in many ways, as by absconding with a view of avoiding payment of a debt under bankruptcy¹ or insolvency laws, by conduct justifying a writ of 'ne exeat regno' or the like, by absconding with a view of avoiding process generally, by concealment of property with a like view, and in other ways.

Some of the statutes upon this subject, as well as some of the provisions of the unwritten law, partake of a criminal character, as e. g. the bankruptcy statutes against the debtor's absconding to avoid the law, and parts of the law in regard to process of 'ne exeat regno;' in that character they will not

¹ Ante, p. 14, and infra.

be commented upon. But as having a civil side also it is important, in treating of the nature, incidents, and consequences of civil frauds generally, to show what the law upon such subjects is.

By the English Bankruptcy Act, 1883, section 25, the court may cause a debtor to be arrested, and any books, papers, money, and goods in his possession to be seized, under the following circumstances:—

(a) If, after a bankruptcy notice has been issued under this Act, or after presentation of a bankruptcy petition by or against him, it appears that there is probable reason for believing that he is about to abscond with a view of avoiding payment of the debt in respect of which the bankruptcy notice was issued, or of avoiding service of a bankruptcy petition, or of avoiding appearance to any such petition, or of avoiding examination in respect of his affairs, or of otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy against him.

(b) If, after presentation of a bankruptcy petition by or against him, it appears that there is probable cause for believing that he is about to remove his goods with a view of preventing or delaying possession being taken of them by the official receiver or trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods, or any books, documents, or writings, which might be of use to his creditors in the course of his bankruptcy.

(c) If, after service of a bankruptcy petition on him, or after a receiving order is made against him, he removes any goods in his possession above the value of five pounds, without the leave of the official receiver or trustee.

(d) If, without good cause shown, he fails to attend any examination ordered by the court.

Certain aspects of bills of discovery and similar proceedings in courts of equity and of common law, founded upon the

concealment of property or of documents,¹ or other frauds, may also be referred to in this connection, without comment. The frauds which come under consideration in such cases are of infinite variety; but they are the same or of the same nature as those which have been under consideration in these volumes.

The English Debtors' Act, 1869, section 6, provides that where a plaintiff in any action in Westminster Hall, in which the defendant would before have been liable to arrest, proves at any time before final judgment that the plaintiff has good cause of action against the defendant to the amount of fifty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England unless apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, he may be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without leave of court.

§ 2. NE EXEAT REGNO.

The writ of 'ne exeat regno,' granted originally, it seems, only for great political purposes, came to be used in the civil administration of the law as early at least as in the time of Queen Elizabeth.² In the time of James the First it was made one of the subjects of Lord Bacon's Ordinances. 'Writs of ne exeat regno,' it is declared, 'are properly to be granted according to the suggestion of the writ in respect of attempts prejudicial to the king and state; in which case the Lord

¹ See chapter 26, § 4.

Wms. 312. The text is taken in substance from Story, and ultimately from Beames, Ne Exeat. See Story, § 1465, note.

² 2 Story, Equity, § 1467; Tothill, Transactions, p. 136; Beames, Ord. of Chancery, p. 40, note 148; Beames, Ne Exeat, p. 16; Ex parte Brunker, 3 P.

Comp. (d), ante, p. 609.

Chancellor will grant them upon prayer of any of principal secretaries, without cause showing, or upon suggestion as his lordship shall think of weight. But also they may be according to the practice of long time in case of interlopers in trade, great bankrupts' estates many subjects are interested, or other cases concern multitudes of the king's subjects; also in case and divers others.'

The writ is not in general granted, where the answer upon which it is founded still prevails, except in equitable debts and claims.¹ It has been used chiefly where a suit has been begun in equity, and the defendant, intending to defeat the plaintiff (or the converse in a cross-bill) of his demand, or to avoid the decree of the court, is about to depart from the country, or the state.² It is provided by Act of Congress that no writ of ne exeat shall be granted by the federal courts unless a suit in equity has been commenced and satisfactory proof made that the defendant designs quickly to depart from the United States.³

There is one exception to the rule that the writ is not granted in respect of equitable debts and claims; and that is in the case of alimony decreed to a wife, which may be enforced by the writ if occasion require.⁴ The ground of equitable interference in England in regard to alimony appears originally to have been that the Ecclesiastical Court, which formerly had jurisdiction of matters of divorce, was unable to execute its decrees perfectly; equity therefore interfered to prevent the decree from being defeated by fraud.⁵ But cases of equitable interference in more recent times do not appear to have assumed the same jurisdiction to that extent;⁶ equity will not interfere.

¹ Story, § 1470.

⁵ *Ib.* § 1472.

² *Ib.* note.

⁶ *Ib.*; *Stones v. Cooke*, 8 S.

³ March, 2, 1793, c. 22, § 5.

note; *Shaftoe v. Shaftoe*, 7 V.

⁴ Story, § 1471. Another supposed exception, in matters of account, is shown to be no exception at all. § 1473.

Dawson v. Dawson, *ib.* 173; *Haffey*, 14 Ves. 261.

seems, in the absence of statute, unless alimony has been decreed,¹ — in which respect the writ affords a strong contrast to the processes of law administered in cases of conveyances made in fraud of claims to alimony.²

In regard to the nature of the equitable demand for which the writ may be used the demand must be certain and actually payable, and not contingent. Further it should be for some debt or demand of distinct amount; it does not lie in respect of a demand of a general unliquidated nature or one resting in uncertain damages.³ But it is not necessary that the technical relation of debtor and creditor should exist between the parties; the cestui que trust, e. g. or the assignee of a bond may have the writ against the obligor.⁴

§ 3. MEANING OF FRAUD IN FOREGOING CASES.

How the provisions of the law in cases falling under the foregoing heads are interpreted, touching the meaning of fraud or the evasion of the process of the courts, does not directly appear. It is not improbable however that on its criminal side the law may require proof of personal intention of wrongdoing. Indeed the same is probably true of the law on its civil side, of all those proceedings under bankruptcy legislation and the like which are 'naturally innocent.'⁵ With regard to the writ *ne exeat regno* however it can only be said that in ordinary cases its use turns upon fraud; and whenever that is the case, it is probable that personal intention of wrongdoing should be proved, because leaving the state is naturally an innocent act.

§ 4. ATTACHMENT.

A great variety of statutes exists in the United States in regard to absconding, or the concealment of one's person or

¹ Story, § 1472.

² Ante, pp. 148, 149.

³ *Ib.*

⁴ *Ib.*; *Grant v. Grant*, 3 Russ. 598;
Leake v. Leake, 1 Jac. & W. 605.

⁵ *In re Moroney*, 21 L. R. Ir. 27, 59,
Palles, C. B., ante, p. 381. See also
ante, pp. 383 et seq.

property, or making away with one's property, in evade the process of law ; upon the proper showing an attachment of property may be granted. The substance of the statutes of a number of the states will here be given.

The laws of New York authorize an attachment of the defendant's property, where the suit is to recover a sum of money only, as damages in certain cases, upon affidavit sworn to by the plaintiff, that the defendant, being a resident of the state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent, or that he has removed or is about to remove his property from the state with intent to defraud his creditors, or that he has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property with like intent.¹

The laws of New Jersey authorize an attachment of the property of any creditor who shall make oath or affirmation that he verily believes that his debtor absconds from his creditors, and is not to his knowledge or belief resident in the state at the time.²

The laws of Pennsylvania authorize an attachment of the property of any debtor, being an inhabitant of the state, who has absconded from the place of his usual abode in the state, or has remained absent from the state, or has confined himself in his own house or concealed himself elsewhere, with design in either case to defraud his creditors. And the like process may be made in regard to a debtor, not having become an inhabitant of the state, who shall confine or conceal himself in any part of the county with intent to avoid the service of process, or to defraud creditors.³

The laws of Maryland authorize an attachment against a debtor who is about to abscond from the state, or who has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal his property, or some portion of it.

¹ Annotated Code of Civil Proc. 1883.

² Rev. 1877.

³ Brightley's Purdon, 10th ed.

intent to defraud his creditors, or who has removed, or is about to remove, his property, or some portion of it, out of the state with like intent.¹

The laws of Virginia authorize an attachment in certain cases on affidavit of belief in effect that the defendant is removing or intends to remove certain property or its proceeds out of the state so that process of execution will be unavailing; in certain other cases upon affidavit that the debtor intends to remove or is removing or has removed his effects out of the state so as not to leave enough probably to satisfy judgment.²

The laws of West Virginia authorize an attachment against a resident of the state upon affidavit that the person has left or is about to leave the state with intent to defraud his creditors, or so conceals himself that a summons cannot be served upon him, or is removing or is about to remove his property or a part thereof out of the state with intent to defraud his creditors, or is converting or is about to convert his property or a part thereof into money or securities with intent to defraud his creditors, or has assigned or disposed of his property or a part thereof or is about to do so with intent to defraud his creditors, or has property or rights of actions which he conceals, or fraudulently contracted the debt or incurred the liability for which the action or suit is brought.³

The laws of North Carolina and of Florida authorize an attachment on affidavit that the defendant has departed from the state with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with like intent, or has removed or is about to remove any of his property from the state with intent to defraud his creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any of his property with like intent.⁴

¹ Rev. Code, 1878.

² Code, 1873.

³ Rev. Sta. 1879.

⁴ Battle's Rev. Pub. Sta. 1873;
Bush's Dig. Fla. Sta. 1872.

The laws of South Carolina authorize an attachment upon affidavit that the defendant has absconded or concealed himself, or is about to remove any of his property from the state, or has assigned, disposed of, or secreted, or is about to dispose of, or secrete any of his property with intent to defraud creditors.¹

The laws of Georgia authorize an attachment in cases upon affidavit that the debtor is actually removed, or is about to remove out of the county, or absconds, or conceals himself, or is causing his property to be removed beyond the state.²

The laws of Alabama authorize an attachment in cases upon affidavit that the defendant absconds, or conceals himself so that ordinary process cannot be served upon him, or is about to remove from the state, or to remove his property from the state so that the plaintiff will probably be unable to collect his debt or have to sue for it in another state, or is about to remove or is about to dispose of his property or has fraudulently disposed of it, or has money, property, or effects, liable for his debt, which he fraudulently withholds.³

The laws of Tennessee authorize an attachment upon affidavit that the debtor or defendant is about to remove or has removed himself or property from the state, or has removed or is removing himself out of the county privately, or conceals himself so that ordinary process cannot be served upon him, or absconds or is absconding or concealing himself or his property, or has fraudulently disposed of or is about fraudulently to dispose of his property, or where both parties being non-residents and residents of the same state the debtor's property has been fraudulently removed to this state to evade the laws in the state of their domicile or residence.⁴

The laws of Ohio, Kansas, and of Nebraska authorize an attachment upon affidavit in certain cases that the def:

¹ Code of Proc., Lynch, 1880.

² Code, 1873.

³ Rev. Code.

⁴ Code, 1858.

has absconded with intent to defraud his creditors, or has left the county of his residence to avoid service of a summons, or so conceals himself that a summons cannot be served upon him, or is about to remove his property or part thereof out of the jurisdiction of the court with intent to defraud his creditors, or is about to convert his property or part thereof into money for the purpose of placing it beyond the reach of his creditors, or has property or rights in action which he conceals, or has assigned, removed, or disposed of, or is about to dispose of his property or part thereof with intent to defraud his creditors, or has fraudulently contracted the debt or incurred the obligation for which suit is or is about to be or has been brought.¹

The laws of Illinois authorize an attachment by a creditor against the property of a debtor, where the debt exceeds \$20, upon affidavit that the debtor conceals himself so that process cannot be served upon him, or has departed from the state with intention of having his effects removed therefrom, or is about to depart from the state with like intention, or is about to remove his property from the state to the injury of such creditor, or has within two years preceding the filing of the affidavit fraudulently conveyed or assigned his effects or a part thereof so as to hinder or delay his creditors, or has within two years prior to the filing of the affidavit fraudulently concealed or disposed of his property so as to hinder or delay his creditors, or is about fraudulently to conceal, assign, or otherwise dispose of his property or effects so as to hinder or delay his creditors.²

The laws of Missouri authorize an attachment in civil actions upon affidavit that the defendant conceals himself so that process cannot be served upon him, or has absconded or absented himself from his usual place of abode in the state, so that process cannot be served upon him, or is about to

¹ Rev. Sts. Ohio, 1880 ; Comp. Laws Kans. 1879 ; Annotated Sts. Neb. 1881.

² Annotated Sts. 1881.

remove his property or effects out of the state, with intent to defraud, hinder, or delay his creditors, or is about to remove out of the state with intent to change his domicile, or has fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors, or has fraudulently concealed, removed, or disposed of his property or effects so as to hinder or delay his creditors, or is about fraudulently to convey or assign his property or effects so as to hinder or delay his creditors, or is about fraudulently to conceal, remove, or dispose of his property or effects so as to hinder or delay his creditors, or that the cause of action accrued out of the state and the defendant has absconded or secretly removed his property or effects into this state.¹

It will not be profitable to go further ; the foregoing fairly represent the attachment laws of all the states, so far as the one question, fraud, is concerned.²

It is no part of the purpose of this work to undertake an examination of the attachment laws of the states ; the only question for consideration relates to the particular aspect or to the various aspects of fraud which they present. And in regard to that matter it will be seen that amidst considerable variation of language the statutes generally agree in authorizing attachment, as for fraud, in the following cases ; where the defendant, being a resident of the state, has absconded or concealed himself with intent to defraud his creditors, or where he has made away, is making away, or is about to make away with his property, whether by alienation or by concealment, with such intent. Very often the intent is expressed to be an intent to evade or avoid process.

What is it that constitutes fraud under these statutes ? The answer to that question appears to vary with the view in which the attachment laws as a whole are regarded, and also with the particular ground for the attachment. In New York

¹ Rev. Sts. 1879.

Rhode Island, suits may be begun by

² In the New England states, except attachment of property as of course.

the attachment laws have been looked upon with more favor than in most other states. Mr. Justice Denio has declared that a liberal indulgence should be extended to attachment proceedings, lest they become a snare rather than a beneficial remedy;¹ and the statement has been repeated.² Accordingly the intent to defraud would be found in New York upon facts which might be deemed insufficient in other states. The language of the learned judge just named, in the case which caused it, indicates that the standard may sometimes be entirely external as distinguished from personal intention to defraud; for he speaks of the proportion of the debtor's ready means to his debts as a matter for inquiry in regard to the intent.³

In many states, probably in most of the states, however the attachment laws are looked upon as 'harsh and extraordinary,'⁴ and proceedings under them are narrowly scrutinized. 'There should be a strict compliance with the statute,' it is declared;⁵ and it is altogether likely that in such states the intent of the statute, in all cases of absconding or concealment of the person, would be considered to mean personal intention in the defendant. There are few if any specific authorities to the question, but the decisions on the whole appear to proceed upon the footing of a requirement of a showing of such intention.⁶ And rightly; for the acts in

¹ *Van Alstyne v. Erwine*, 11 N. Y. 331, 340.

² *Talcott v. Rozenberg*, 3 Daly, 203, 206.

³ It was not said however that the want of due proportion would establish the intent, though there is reason for thinking that it might. See *infra*.

⁴ *Bullene v. Smith*, 73 Mo. 151, 159; *Winkler v. Barthel*, 6 Bradw. 111, 114 ('summary and harsh').

⁵ *Winkler v. Barthel*, *supra*; *Johnson v. Johnson*, 31 Fed. R. 700; *Randle v. Mellen*, 67 Md. 181.

⁶ See *Morgan v. Avery*, 7 Barb. 656; *Rosenfield v. Howard*, 15 Barb. 546; *Haizlette v. Lake*, Deady, 469; *Shove v. Farwell*, 9 Bradw. 256; *Spencer v. Deagle*, 34 Mo. 455; *Enders v. Richards*, 33 Mo. 598; *Boggs v. Bindskoff*, 23 Ill. 66; *Young v. Nelson*, 23 Ill. 565; *Buford Implement Co. v. McWhorter*, 41 Kans. 262; *Mack v. Jones*, 31 Fed. R. 189; *Hughes v. Lake*, 63 Miss. 552; *First National Bank v. Rosenfield*, 66 Wis. 292; *Littlejohn v. Jacobs*, 1b. 600; *Ferguson v. Chastant*, 35 La. An. 339; *Hunter v. Soward*, 15 Neb. 215.

question, in such cases, are 'naturally innocent.'¹ It is clear that the same would not be true in New York; the only difference is that in the latter state evidence might be allowed a weight, as mere evidence, which other states would refuse to it.

On the other hand, there is reason to think that the question of intent under these laws relates to disposition of property made by the defendant with intent to defraud. It is, when an attachment is asked for on the ground that the defendant has made, is making, or is about to make dispositions of his property with intent to defraud his creditors. In such cases there is reason to think that the intent required by the attachment law is ordinarily the same as in the statutes against fraudulent conveyances themselves. Acts which would establish personal intention, ordinarily should establish intent; for it would be strange that a conveyance could be pronounced fraudulent under the statutes against fraudulent conveyance, and yet not fraudulent under the attachment law.

And, though it is not safe to generalize much in the absence of special and varying statutes, this has the direct support of authority.² A case³ in Missouri, in which state the

As to absconding or concealing oneself see *Malone v. Handley*, 81 Ala. 117; *In re Fitzgerald*, 2 Caines, 318; *Ex parte Schroeder*, 6 Cowen, 603, 605; *In re Thompson*, 1 Wend. 43; *Ex parte Chipman*, ib. 66; *In re Warner*, 3 Wend. 424; *Ross v. Clark*, 32 Mo. 296; *Brady v. Parker*, 67 Ga. 636; *Havis v. Taylor*, 13 Ala. 324 (knowledge of the neighborhood); *Powell v. Governor*, 9 Ala. 36 (same); *Pitts v. Burroughs*, 6 Ala. 733 (same); *Middlebrook v. Ames*, 5 Stewt. & P. 158; *Walcott v. Hendrick*, 6 Texas, 406 (knowledge of neighborhood; compare with Ala. cases supra); *Field v. Anderson*, 7 Md. 209; *Stouffer v. Md.* 477; *Fitch v. Waite*, 5 Md. 477; *Evans v. Saul*, 8 Mart. N. S. 4; *v. Gowing*, 5 Rich. N. S. 4; *v. McGee*, 5 Yerg. 428. These are not altogether in harmony; often due to variance in the language of the statutes.

¹ See ante, pp. 381, 383.

² See *Anderson v. Patterson*, 599; *Rice v. Morner*, ib.; *Armstrong*, 65 Wis. 225; *v. Sloan*, 65 Miss. 407; *v. Cissna*, 17 Mo. App. 218; *v. Liverman*, 17 Mo. 218; *Henlein*, 34 Hun, 562 (but

³ *Field v. Liverman*, 17 Mo. 218.

ment laws are regarded as 'harsh and extraordinary,'¹ turned in part upon a confession of judgment made by the debtor in favor of M. And the question was, whether the confession was ground for an attachment, as having been made with intent to hinder or delay creditors. It was held that it was, if the execution in favor of M was to be 'held up' until other executions came in; the Supreme Court declared that such facts would 'render the execution dormant and fraudulent as against subsequent executions.'² What the motive may have been for the direction to hold up the execution is immaterial. Nor is this doctrine affected by the rule that the plaintiff must, under the statute of Missouri, show that the defendant's act was fraudulent as well as a hindering of his creditors;³ for the direction to hold up the execution till other executions come 'crowding in' itself constitutes the fraud.⁴

One of the cases⁵ just cited will serve further to enforce the point. In that case instructions to the following effect were sustained: 1. If the jury believe that at the time of the commencement of the suit the defendant had conveyed or assigned any of his property or effects for the purpose of hindering or delaying any of his creditors, *or* for the purpose of compelling his creditors to compromise or compound their debts by taking less than the amount due, *or* for the purpose

83 Hun, 549); *Durr v. Hervey*, 44 Ark. 301; *Curtis v. Hoadley*, 29 Kans. 566; *Knowles v. Sell*, 41 Kans. 171, tenant's removal of crops; *Masterson v. Bentley*, 60 Ala. 520, same. *Brickell*, C. J. in the last case: 'It is the fact of removal or of the intent to remove manifested by some overt act or declaration, which is the ground of attachment. The language of the statute renders it incapable of any other construction, and no other can be given to it, without impairing its beneficial operation.' *Contra*, *McPike v. Atwell*, 34 Kans. 142.

¹ *Bullene v. Smith*, 73 Mo. 151, 159.

² The rule appears to be well settled. *Whipple v. Foot*, 2 Johns. 422; *Doty v. Turner*, 8 Johns. 20; *Storm v. Woods*, 11 Johns. 112; *Kellogg v. Griffin*, 17 Johns. 274; *Russell v. Gibbs*, 5 Cowen, 390; *Edwards v. Harben*, 2 T. R. 596, *Buller, J.*; *Rice v. Sarjeant*, 7 Mod. 37. It will be considered further in the next chapter, to which in its more common phase it belongs.

³ *Enders v. Richards*, 33 Mo. 598; *Spencer v. Deagle*, 34 Mo. 455; *Shove v. Farwell*, 9 Bradw. 256, 260.

⁴ *Field v. Liverman*, *supra*, and the cases last cited.

⁵ *Enders v. Richards*, *supra*.

of inducing any of his creditors to grant him an extension of time for the payment of their debts, they will find for the plaintiffs. 2. Although the jury may believe that the trust was executed for the purpose of securing the debts to R and others and that R and the trustee may have acted throughout in good faith, yet if they find that part of the purpose of the defendant in making the assignment was to keep off his creditors, or to hinder or delay them from covering up his property from them, they will find for the plaintiffs.¹

This subject has a further illustration in the language of a learned judge in a recent case² touching threats on a debtor to make an improper assignment of his property if pursued by a particular creditor. After giving as an example of such an assignment a transfer of property

¹ In *Shove v. Farwell*, 9 Bradw. 256, 260, the court says that the statute contemplates that the fraud shall be 'of fact as contradistinguished from a legal or constructive fraud.' It is hardly necessary to say that fraud may be and often is 'of fact' without being a matter of personal intention. See pp. 181, 182, 379. Nor is there anything to show that the learned judge in *Shove v. Farwell* meant by 'of fact' personal intention. The following is his very good illustration: 'If a man has shown himself to be dishonest, by making a conveyance of his property designing thereby to delay and hinder his creditors, and such effect is produced, then for the space of two years the statute permits the creditor to treat him as one who may repeat his fraud, and authorizes its prevention by a seizure of his property.' *Spencer v. Deagle*, 34 Mo. 455, followed.

What constitutes concealment of property see *O'Neil v. Glover*, 5 Gray, 144. Thomas, J.: 'Concealment is the doing of an act, whether by way of conveyance or transfer, by which the

true title and ownership of it is kept from the view of the creditors when done with the intent and effect of preventing its being attached or taken on execution. . . . A debtor should transfer his stock in a company to B as collateral security for a debt. Having paid the debt should transfer it in the name of B with a view to the purpose of preventing the attachment or seizure on execution. If creditors, there would be a concealment of his property in the stock.' So it is laid down in *Adams v. Lindsell*, 7 Pick. 542, 549, that a collusion to found an attachment of property of another's debtor 'is a mode of preventing the debtor's effects so that they may not be drawn from the reach of creditors who might wish to avail themselves of their legal right to attach or seize them.' There need be no personal intention to defraud in such a case. *Ib.* p. 630, note.

² *Gashirrie v. Apple*, 14 Abb. 401. *Robertson, J.*

trust for the debtor,¹ it was declared that whatever purpose, inserted in the assignment, would render the assignment void as legally fraudulent, ought, when declared verbally to be the object of an intended assignment, to be considered as of an equally fraudulent character.² It is clear that it is not necessary that there should have been any personal intent to defraud to avoid the assignment in such a case.³ And the same was distinctly laid down in a Massachusetts case⁴ in which there had been a collusive attachment of property which, if upheld, would defeat, as a concealment of the debtor's property, the rights of other creditors.

¹ Chapter 11.

² To the same effect *Livermore v. Rhodes*, 27 How. Pr. 506. A mere threat to assign would be a different thing, for that would only be a threat to do what the law allows. *Ib.* ; *Wilson v. Britton*, 6 Abb. Pr. 97 ; *Dickinson v. Benham*, 10 Abb. Pr. 390 ; s. c. 12 Abb. Pr. 158. See as to threats to conceal property *Newman v. Kraim*, 34 La. An. 910.

³ Ante, pp. 263, 273.

⁴ *Adams v. Paige*, 7 Pick. 542, 550. Parker, C. J. : ' We see no necessity of proving, nor do we impute to the defendants, any wicked or corrupt design to cheat or defraud the plaintiffs. It is enough that they associated together and aided each other to do an unlawful act prejudicial to the plaintiffs, so that,

in regard to the law of debtor and creditor, it is fraudulent.'

The second sentence, it is conceived, is judicial authority of the best for the view of fraud set forth in this volume. It may be remarked that Shaw, who succeeded Parker, as Chief Justice, was counsel for the plaintiffs ; and that he admitted that there was no personal intention to defraud in the case. See p. 546, of the Report. The case, it is true, was an action for damages, but the wrong was one of the nature of wrongs under the statute of 13 Elizabeth as well ; and the very question before the court was whether the transaction was fraudulent. ' We have only to decide,' said the court, ' whether it was fraudulent.'

IV. EVASION OF LAW IN OTHER WA

THE present title is in the nature of things con-
somewhat miscellaneous material. Connection bet-
parts is often indeed entirely wanting; though to-
gether the subject is connected with what has gone
the present volume, by the tie of 'circumvention' a-
fore explained, he who is or is to be defrauded being
to the transaction in which the fraud is concocted.

CHAPTER XXVI.

REMAINING SUBJECTS OF CIRCUMVENTION

§ 1. 'HOLDING UP' EXECUTION.

THE first subject to be presented is closely connec-
with what has immediately preceded and also with a
aspect of the general subject of conveyances in fraud
itors. What is now referred to is the 'holding up,'
plaintiff, of a levy of execution until others are m
matter which, so far as the debtor's interests are con-
and brought forward, belongs perhaps to the general
fraudulent conveyances under the statute of 13th El
and our corresponding legislation, but which, in regard
creditor's conduct and interests alone, may be consid-
fall without the limits of that subject. This latter is
pect in which the matter will now be considered.

So long ago as the year 1702 the following case¹ arose: A man has judgment for a just debt against A, and takes out a fieri facias and gets the sheriff to seize goods, but *will not* let him proceed further, and suffers the goods to remain in the custody of the debtor. B, who also has a judgment against A for a just debt, takes out a fieri facias; and the question is, whether he can take the same goods. The answer was, 'he may, for the former was a fraudulent execution; and the sheriff may very well return "nulla bona" upon the first execution.'²

In another early case³ a decision (not named) was cited on the argument where a man took out execution against another. By agreement between them the owner was to keep possession of the goods upon certain terms; and afterwards another obtained judgment against the same man, and took the goods in execution. It was held that he might do so; the first execution was fraudulent and void against any subsequent creditor, because there was no change of possession and so no alteration of the property.⁴

The principle of these decisions took root at the beginning of the present century in this country;⁵ indeed it was laid down broadly at first that if a creditor seize the goods of his debtor on execution and *suffer* them to remain in the debtor's hands, the execution is deemed fraudulent and void against a subsequent execution.⁶ Later however it was pointed out that the rule rested upon the ground that the plaintiff in the execution had been guilty of conduct which caused the holding

¹ Rice v. Sarjeant, 7 Mod. 37.

² Lovick v. Crowder, 8 Barn. & C. 132; Hurst v. Hooper, 12 Mees. & W. 664.

³ Bucknal v. Roiston, Prec. Ch. 287; Edwards v. Harben, 2 T. R. 596, Buller, J.

⁴ See to the same effect Hunt v. Hooper, 12 Mees. & W. 664; Lovick v. Crowder, 8 Barn. & C. 132; Pringle

v. Isaac, 11 Price, 445; Foster v. Smith, 13 Up. Can. Q. B. 243.

⁵ Whipple v. Foot, 2 Johns. 418, 422; Storm v. Woods, 11 Johns. 112; Russell v. Gibbs, 5 Cowen, 390; Corlies v. Stanbridge, 5 Rawle, 286

⁶ Whipple v. Foot, 2 Johns. 422, Thompson, J. The execution is also called 'dormant' in these cases.

§ 1.] REMAINING SUBJECTS OF CIRCUMVENTION.

up of the command of the writ; it was not for mere absence in the sheriff's failure to perform his duty that the plaintiff lost his advantage.¹ It was accordingly held still is held, that a creditor was not within the rule which only been indulgent or neglectful, or had merely suffered the sheriff not to complete his duty, until other execution came in, unless indeed the delay was of such duration as to indicate that the creditor had directed it.²

Thus in a case³ just cited the plaintiff gave an execution to the sheriff and told him to proceed, at the same time that he (the plaintiff) did not wish to distress the defendant who was his father-in-law, and that the sheriff need not take a receipt for the property as the defendant would not deliver or conceal it. The sheriff made a levy and did no more until a second execution came to his hands, which was sold on both. It was held that the plaintiff had not lost the benefit of his execution.⁴ But long delay, it was said, might have made a different case.⁵

In Pennsylvania it appears to be held unnecessary for an execution plaintiff to make any communication at all with the officer, where the plaintiff is shown to have had a fraudulent intent and the officer's conduct in the matter has been the same in effect which it would have been had he received instructions in accordance with the fraudulent intent and acted in conformity to them. Indeed this may not be inconsistent

¹ *Storm v. Woods*, 11 Johns. 112; *Kellogg v. Griffin*, 17 Johns. 274.

² *Russell v. Gibbs*, 5 Cowen, 390; *Rew v. Barber*, 3 Cowen, 279; *Doty v. Turner*, 8 Johns. 20; *Herkimer Bank v. Brown*, 6 Hill, 232; *Brown's Appeal*, 26 Penn. St. 490; *Landis v. Evans*, 113 Penn. St. 332; *Burnham v. Martin*, 54 Ala. 189; *Field v. Liverman*, 17 Mo. 218. See *Keel v. Larkin*, 72 Ala. 493; *Acton v. Knowles*, 14 Ohio St. 18; *Bliss v. Ball*, 9 Johns. 132; *Deposit Bank v. Berry*, 2 Bush, 236.

³ *Doty v. Turner*.

⁴ *Herkimer Bank v. Brown*, 232.

⁵ 'If a long time had intervened between the one execution and the other, it would have been ground for inferring the consent of the plaintiff to the delay, and might have destroyed the legal presumption of fraud. See *Doty v. Turner*, supra; quoted and affirmed in *Russell v. Gibbs*, supra; *Waldron v. Waldron*, 31 Ill. 120.

the general rule which requires *conduct* on the part of the plaintiff, in order to affect his lien ; it clearly cannot help the case that no communication was made to the sheriff of an improper arrangement made between the execution plaintiff and defendant.¹ The following case² will serve to illustrate the point: —

The stock in business of A had been taken in execution and sold at the suit respectively of B, C, and D; and the question was, how the money should be appropriated. The judge at the trial was asked to instruct the jury thus: 1. If the several executions of B and C were levied on the goods of A to *secure* their claims merely, and not to obtain satisfaction, they were fraudulent and void. 2. If there was an arrangement that those executions were to be placed in the sheriff's hands and levied, but not to be followed by sale unless other executions came in against A, then the executions of B and C must be postponed to the execution of D. 3. If after the sheriff made his levy under B's execution and thereby stopped A's business B made an agreement with A and with the sheriff that he would carry on the business, and use the stock levied on, for an indefinite time, the lien of his execution was thereby lost. The judge gave these instructions with this addition, that the execution plaintiffs must not only have made the arrangement with A, but must have communicated the fact to the sheriff so as to authorize him to suspend the writs.

This was held wrong. It was now laid down, in language broader apparently than the case required, that it was not the communication to the sheriff of the fraudulent design, nor the direction to him to act accordingly, that would postpone the executions in question; it was the injurious effect that might be produced upon other creditors, in the natural tendency of the design to hinder and delay them. If it were shown that an execution plaintiff put his writ into the hands

¹ Flick v. Troxsell, 7 Watts & S. 65.

² Weir v. Hale, 3 Watts & S. 235.

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of the sheriff with any other view than that of having executed in good faith, and it was not so executed, it is good against subsequent executions. The plaintiff's execution might have his purpose answered in many ways without communicating it to the sheriff, as e. g. when the sheriff leaves possession with the defendant, or does nothing because that was what the plaintiff desired and he has directed had that been necessary.

Whatever be the better rule however with regard to the effect of a fraudulent design, merely, on the part of an execution plaintiff which in fact is accomplished by, though not communicated to, the sheriff, it is very generally, though not universally, agreed that for an execution plaintiff to give instructions to the officer directly or indirectly, — in whatever way, whether not to levy or after levy, — to hold up the execution indefinitely, or until further orders,¹ to keep the fact secret,² or the like, will be fatal if other executions (or a single other execution) reach the officer's hands before he has orders from the first plaintiff to proceed.³ This rule however does not prevent the plaintiff from making

¹ *Corlies v. Stanbridge*, 5 Rawle, 286. Serjeant, J.: 'If the plaintiff delivers an execution to the sheriff with direction not to levy at all, or not until further orders, it creates no lien . . . as against a creditor issuing and proceeding with a subsequent execution. *Commonwealth v. Strembeck*, 3 Rawle, 344. The rule is the same if there is a levy accompanied with directions to stay proceedings. *Ib.*; *Hickman v. Colwell*, 4 Rawle, 376. In both cases the plaintiff's object is considered to be to obtain security, not satisfaction, for his debt, and the employment of an execution for this purpose is a perversion of its design and a fraud against third persons.' See also *Stroudsburg Bank's Appeal*, 126 Penn. St. 523.

² *Price v. Shipps*, 16 Barb. 585, dis-

tinguishing *Butler v. May*, 1 Wend. 548.

³ See the cases cited *supra* note 2; *Cornell v. Cook*, 7 Cow. 315; *Kimball v. Munger*, 2 H. & C. 115; *Price v. Shipps*, 16 Barb. 585; *Price v. Berry*, 55 Barb. 620; *Kearney v. Barnard*, 5 Hill, 377; *Smith v. Smith*, 77 N. Y. 466; *Commonwealth v. Strembeck*, 3 Rawle, 341; *McClure v. Watts*, 74; *Flick v. Troxell*, 10 Pa. & S. 65; *Snyder v. Beam*, 1 Pa. 366; *Truitt v. Ludwig*, 26 Pa. 145; *Brown's Appeal*, *ib.* 490; *Burger's Appeal*, 40 Penn. 8; *Landis v. Evans*, 113 Penn. 1; *Stroudsburg Bank's Appeal*, 126 Penn. St. 523; *Ross v. Weber*, 26 Ill. 1; *Davidson v. Waldron*, 31 Ill. 1; *More v. Davis*, 84 Ill. 487, 489.

able adjournment of the sale under the writ;¹ indefinite adjournment would make a different case.²

What the actual motive of the plaintiff may have been in these cases is immaterial. It may have been mere kindly indulgence to the execution defendant;³ it may have been the desire to obtain security through the lien of the levy;⁴ it may have been the receiving a valuable consideration.⁵ Thought of fraud may not have entered the mind of the plaintiff; still the arrangement made, or the direction given, is a fraud in the eye of the law upon subsequent execution creditors and purchasers for value without notice.⁶ And that the

v. Wallace, 66 Ind. 410, 421; *Alabama Life Ins. Co. v. McCreary*, 65 Ala. 127; *Burnham v. Martin*, 54 Ala. 189; *Albertson v. Goldsby*, 28 Ala. 711; *Patterson v. Hayter*, 15 Ala. 18; *Branch Bank v. Broughton*, *ib.* 127; *Leach v. Williams*, 8 Ala. 759; *Wood v. Gary*, 5 Ala. 52; *Slocumb v. Blackburn*, 18 Ark. 809; *Michie v. Planters' Bank*, 4 How. (Miss.) 130, 141; *Berry v. Smith*, 3 Wash. C. C. 60; *Lovick v. Crowder*, 8 Barn. & C. 132; *Hunt v. Hooper*, 12 Mees. & W. 664.

Contra, *Cumberland Bank v. Hann*, 4 Har. (N. J.) 166; *Janvier v. Sutton*, 3 Har. (Del.) 37; *Hickman v. Hickman*, *ib.* 484; *Greenwood v. Naylor*, 1 McCord, 414. The subject is regulated more or less by statute.

On the practice in such cases see *Knower v. Barnard*, 5 Hill, 377; *Kimball v. Munger*, 2 Hill, 364. But see *Barber v. Mitchell*, 2 Dowl. Pr. Cas. 574. The question may arise in the way of an action by the execution plaintiff against the sheriff for a false return. See the English cases first above cited.

The rule of course does not apply to stay of execution by the courts. *Bain v. Lyle*, 68 Penn. St. 60.

¹ *Lautz v. Worthington*, 4 Barr, 153;

Dancy v. Hubbs, 71 N. Car. 424; *Dougherty v. Logan*, 70 N. Car. 558; *Perry v. Morris*, 65 N. Car. 221 (rule of practice by Supreme Court).

² *Lautz v. Worthington*, *supra*. See *Childs v. Dilworth*, 44 Penn. St. 123; *McClure v. Ege*, 7 Watts, 74.

³ *McClure v. Ege*, 7 Watts, 74. *Comp. Doty v. Turner*, 8 Johns. 20, *supra*, p. 633.

⁴ This is a very common feature in the Pennsylvania cases. *Corlies v. Stanbridge*, 5 Rawle, 286; *Weir v. Hale*, 3 Watts & S. 285; *Brown's Appeal*, 26 Penn. St. 490; *Truitt v. Ludwig*, *ib.* 145; *Freeburger's Appeal*, 40 Penn. St. 244, 246; *Landis v. Evans*, 113 Penn. St. 332; *Stroudsburg Bank's Appeal*, 126 Penn. St. 523. In South Carolina the rule appears to be contra. *Greenwood v. Naylor*, 1 McCord, 414, sustaining a writ 'lodged to bind.' Of course it is nothing that the plaintiff levied to prevent other creditors taking the property, so long as his levy was not to be held up, as for a lien or other improper purpose. *Brown's Appeal*, 26 Penn. St. 490; *Stroudsburg Bank's Appeal*, 126 Penn. St. 523.

⁵ *Burnham v. Martin*, 54 Ala. 189.

⁶ *Ac. Freeman, Executions*, § 206.

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fraud is properly to be treated as actual, and not merely constructive¹ is shown by its consequences; it is clear that the creditor, as well as the debtor, may lose anything which he may have expended upon the property after the deed is held up the execution. That appears to be a test, in some cases, of the question whether the fraud is actual or constructive; if the fraud is constructive only, — the act, though innocent when first done,² — the party who loses his honest and innocent outlays.³ The fraud, though actual, causes no forfeiture; the wrongdoing is only postponed; if anything is left after the other creditors are paid, he may proceed, since the debtor has no ground to object.⁴

§ 2. ALTERATION OF WRITTEN INSTRUMENTS.⁵

Where there has been an alteration or suppression of instruments which might have thrown light upon a suit, the thing will be presumed against the party by whom whose agent such alteration or suppression has been effected; and every presumption will be made in favor of the prima facie rights of the other party.⁶ In accordance with this principle, if a writing, under seal or not, be altered in material part by the person claiming under it, pro tanto he can neither recover upon the altered instrument nor avail himself of the true original form of the instru-

¹ It is sometimes incautiously spoken of as constructive where the personal intention to defraud is wanting. *Alabama Life Ins. Co. v. McCreary*, 65 Ala. 127. That is well enough here, as in other places, if the meaning only is that no stigma is to be put upon the plaintiff. See ante, p. 379.

² Vol. 1, *Intro.* p. xii; also *ib.* pp. 261, 384.

³ See ante, pp. 403-406.

⁴ *Keel v. Larkin*, 72 Ala. 493. So

of course of the debtor's relatives. *Ib.*

⁵ See vol. 1, pp. 255-257.

⁶ *Bowles v. Stewart*, 1 Schoa 222; *Eyton v. Eyton*, 1 Brown Cas. 153; *Hampden v. Hampden*, 252; *Sepalino v. Twitty*, Cas. in

⁷ *Burnham v. Ayer*, 35 N. H. 127; *Cole v. Hills*, 44 N. H. 227; *Emigrant Bank*, 98 Mass. 12.

⁸ *Pigot's Case*, 11 Coke, 27; *v. Mayberry*, 3 Leigh, 250.

And a vendor of property, who has materially altered a promissory note given him for the price thereof, presumptively cannot resort to the original consideration, whether the note was received in payment or not.¹ But further if a bill or note be complete, any alteration in a material part, without the consent of the parties to it, renders it invalid even in the hands of a subsequent innocent holder for value.²

The fact that an altered note has been restored by the use of chemicals to its original form and amount, in the presence and without objection of the defendant, does not revive its validity; and the maker may plead the alteration in bar of all liability on the note, even against a bona fide indorsee, since the note sued upon in such a case is not the note which the plaintiff purchased.³ As regards what will constitute such a material alteration, the cases furnish many illustrations.

The addition of a promise to pay interest to a bill or note by a party thereto, without the consent of the acceptor or maker, renders the instrument invalid even in the hands of a bona fide holder for value; and there can be no recovery against the acceptor or maker, even for the amount of the paper as originally executed.⁴ And it is not material that

¹ *Smith v. Mace*, 44 N. H. 553; *Booth v. Powers*, 56 N. Y. 22; *Wheelock v. Freeman*, 13 Pick. 164; *Arrison v. Hamstead*, 2 Barr, 101; *White v. Huss*, 32 Ala. 430; *Whittier v. Frye*, 10 Mo. 348.

² *Wade v. Withington*, 1 Allen, 561; *Citizens' Bank v. Richmond*, 121 Mass. 110; *Belknap v. National Bank*, 100 Mass. 376; *Draper v. Wood*, 112 Mass. 315; *Wood v. Steele*, 6 Wall. 80; *Holmes v. Trumper*, 22 Mich. 427; *Bank of Newark v. Crawford*, 2 Houst. 282; *Sudler v. Collins*, ib. 538; *Woolfolk v. Bank of America*, 10 Bush, 504, 517; *Morehead v. Parkersburg Bank*, 5 W. Va. 74; *Burchfield v. Moore*, 8 El. & B. 683; *Lochnave v. Emerson*, 11 Bush, 69. In *Wade v. With-*

ington, Bigelow, C. J. (for the court) says: 'This doctrine rests on the principle that parties can be held liable only on their contracts as originally made and entered into by them. The identity of the instrument with that which was executed by the defendant is an essential element in every action upon a written contract, from which his assent to its terms may be fairly presumed. If this is changed by a material alteration, without the privity of the party liable upon it, it ceases to be his contract.' This, it is added, is as true of negotiable instruments as of others.

³ *Citizens' Bank v. Richmond*, 121 Mass. 110.

⁴ *Holmes v. Trumper*, 22 Mich. 427; *Fay v. Smith*, *supra*.

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the alteration consisted merely in filling a blank left *rate* of interest, if the sum inserted be larger than it would otherwise have carried.¹

It is held however that the owner of a note or bill 'at' —, with a blank for the place of payment, has a right to supply the name of such a place; and, though this is contrary to the agreement of the parties, the paper, if indorsed, is good in the hands of a bona fide holder for value.

The effect of adding a place of payment to a bill of exchange payable generally, or at a different place from that added after acceptance, has been the subject of divisions of opinion in England. In several of the earlier cases it was held that such an alteration was not material.² Later authorities, however, are opposed to this view;³ and it is now the law in this country that such an alteration destroys the bill in the hands of a subsequent indorsee for value without notice of the fact.⁴ It is settled law in this country that if the holder of a bill of exchange alter the general tenor thereof by the addition of a place of payment, the instrument is vitiated towards all parties not consenting to the alteration.⁵ But if an accommodation indorser deliver an accepted bill to the acceptor to enable him to raise money on its negotiation, and the acceptor change a general

¹ *Holmes v. Trumper*, supra. The instrument is complete notwithstanding the fact that it may end with the words 'with interest at.' The last word is to be disregarded in such a case; or, at all events, it authorizes the insertion only of the implied rate of interest. *Ib.* See *Warrington v. Early*, 2 El. & B. 763; *Waterman v. Vose*, 43 Maine, 504. The cases of *Visher v. Webster*, 8 Cal. 109, and *Fisher v. Dennis*, 6 Cal. 577, were somewhat doubted in *Holmes v. Trumper*.

² *Redlich v. Doll*, 54 N. Y. 234.

³ *Jacobs v. Hart*, 6 Maule & S. 142; *Stevens v. Lloyd*, *Moody & M.* 292.

⁴ *Cowie v. Halsall*, 4 B. & A. 197; *Calvert v. Baker*, 4 M. & W. 417; *Burchfield v. Moore*, 3 B. & A. 683. If the alteration be made with the consent of the acceptor, he cannot afterwards object. *Cubley*, 2 Crompt. & M. 15; *Tyrwh.* 87.

⁵ *Burchfield v. Moore*, supra.

⁶ *Whitesides v. Northern*, 10 Bush, 501; *Wilcox*, 3 How. (Miss.) 330; *Barbour*, 3 Ind. 414; *Pahlmeyer*, 75 Ill. 629; *Southwark*, 35 Penn. St. 80.

qualified acceptance by designating a particular place of payment, the indorser will still be liable to an innocent holder for value.¹ So too if the maker of a note has express or implied authority to consent for the other parties, as where they are his partners, and the whole transaction is firm business, the case will be different.²

Again an alteration of the date of a bill of exchange made after acceptance avoids the contract,³ even towards a bona fide holder for value.⁴ If however there be proof that the alteration was made with the assent of the acceptor, or of a subsequent assent by him, the bill will be good against him, though invalid towards all other non-assenting parties.⁵ Nor will it avoid the instrument to correct a mistake in the date, before others have acted upon it.⁶

It is laid down that the alteration of a contract which will vitiate the agreement need not prejudice the party sought to be charged. An erasure of a seal, for example, after the name of a surety, will operate to discharge the surety. The reason is that the identity of the instrument is thereby obscured; and the substitution of another in its place might be possible, if the rule were not rigidly enforced.⁷ It has accordingly been decided that, if the holder of a note add the name of another party to a note as surety, he cannot recover thereon against the other parties.⁸ But it is held in England that an addition of a signature to a note in the nature of an

¹ *Todd v. Bank of Kentucky*, 3 Bush, 626; *Rogers v. Poston*, 1 Met. (Ky.) 643; *Whitesides v. Northern Bank of Ky.* supra.

² *Pahlman v. Taylor*, 75 Ill. 629.

³ *Langton v. Lazarus*, 5 Mees. & W. 629; *Bowman v. Nicholl*, 5 T. R. 537; *Bathe v. Taylor*, 15 East, 412; *Kennedy v. Lancaster Bank*, 18 Penn. St. 847.

⁴ *Master v. Miller*, 4 T. R. 320; s. c. 2 H. Bl. 141; 5 T. R. 637 in Ex. Ch.

⁵ *Paton v. Winter*, 1 Taunt. 420; *Tarleton v. Shingler*, 7 C. B. 812. See *Walter v. Hastings*, 2 Chit. 121; s. c. 4 Campb. 223.

⁶ *Brutt v. Picard*, Ryan & M. 37.

⁷ *Organ v. Allison*, 9 Chicago L. N. 250; 1 Greenleaf, Evidence, § 565. See *Crockett v. Thomason*, 5 Sneed, 345; *Blair v. Bank of Tennessee*, 11 Humph. 84; *Wood v. Steele*, 6 Wall. 80.

⁸ *Shipp v. Suggett*, 9 B. Mon. 5; *Bower v. Briggs*, 20 Ind. 139.

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indorsement, though put upon the face of the instrument does not invalidate it.¹

A distinction is sometimes drawn in these cases of distinction between fraudulent and non-fraudulent acts. But from alterations made to correct a supposed mistake, distinction is unsound. If there has been a material alteration there has been an act which, if allowed to stand, works rights; and he who made the alteration knew, or was to know, that fact. Hence, though there may have been personal intention to defraud, there was still endeavor to work rights, by circumvention. Those authorities are sound and exclude personal intention of wrongdoing.²

A distinction has also been taken between the effect of an act upon an executory and upon an executed contract. In the former case the contract becomes null; in the latter at least in conveyances of real estate, the rule is otherwise. By the execution of the deed of grant, the property and vests in the grantee; and the destruction of the deed does not defeat the estate.³ Hence a mortgagee may close a mortgage, notwithstanding the fact that since the execution of the deed he has fraudulently added the signature of the grantor's wife in token of her relinquishing dower.⁴ But the contrary of this doctrine has been held in Illinois and New York.⁵ And it has been held in Vermont that, if a lessee fraudulently alter his lease in a material part subsequently to its execution, he thereby destroys all future rights under the lease, either to retain possession of the premises or to preclude the lessor from re-entering them.⁶

¹ Ex parte Yates, 2 De G. & J. 191. Hatch v. Hatch, 9 Mass. 301.

² Fay v. Smith, 1 Allen, 477; Draper v. Wood, 112 Mass. 315. But see Greenl. Evidence, § 568.

Kountz v. Kennedy, 63 Penn. St. 187. ⁴ Kendall v. Kendall, supra.

The Massachusetts cases here use 'fraudulent' in the popular sense, and so exclude it. ⁵ Vogle v. Ripper, 34 Ill. 1. ⁶ Bliss v. McIntyre, 18 Vt. 135.

³ Kendall v. Kendall, 12 Allen, 92 ;

§ 3. DELIVERY OF INSTRUMENTS.

A deed or other instrument the delivery of which is obtained from the maker by fraud, without his knowledge, consent, or acquiescence, and without negligence on his part, does not pass the title to the property embraced in it, even against a subsequent purchaser for value without notice.¹ Fraud in obtaining delivery of an instrument, though the execution of which was obtained bona fide, affects it as much as if practised to obtain the execution.² Thus if the delivery of a negotiable promissory note were obtained without negligence on the part of the maker, under the circumstances above stated, the title to it cannot be passed so as to bind the maker.³ And the same doctrine prevails where a deed, or a note and mortgage, deposited in escrow, are afterwards fraudulently procured, without consent, from the depositary, before the terms of the deposit have been complied with.⁴

§ 4. SUPPRESSION OR DESTRUCTION OF WRITINGS.

If an heir suppress a deed or will of his ancestor, in order to prevent another party, as a grantee or devisee, from obtaining the estate vested in him thereby, equity will grant relief upon due proof by other evidence, and perpetuate the possession and enjoyment of the estate in such grantee or devisee.⁵ And in general, where the contents of a suppressed or destroyed instrument are satisfactorily proved, the party will, in equity at least, receive the same benefit that he would otherwise have received.⁶

¹ *Fisher v. Beckwith*, 30 Wis. 55; 415. As to the effect of negligence on *Everts v. Agnes*, 4 Wis. 343; s. c. 6 the part of the maker, see the same Wis. 458. See *Burson v. Huntington*, case.

21 Mich. 415.

⁴ *Ib.*; *Andrews v. Thayer*, 30 Wis.

² *Abington v. Butler*, 1 Ves. Jr. 228; *Powell v. Conant*, 33 Mich. 396. 206.

⁵ 1 Story, *Equity*, § 254.

³ *Burson v. Huntington*, 21 Mich.

⁶ *Ib.* See ante, p. 617.

§ 5. PARTNERSHIP.

An appropriation of partnership assets by one partner without the knowledge of his copartners, in satisfaction or for security of his private debt, is presumed to be fraudulent against the other members of the firm, and may be set aside by them. And upon the insolvency of the wrongdoing partner, the defrauded partners and the creditors of the firm may alike prove against the separate estate of the wrongdoer;¹ and that without regard to the question whether at the time of the proof that estate is larger than otherwise it would have been or not.²

The presumption of fraud, however, is not always conclusive.³ In the case first cited the sole acting member of a dissolved partnership, having full power to dispose of its property and to pay its debts, became himself a creditor of the firm by advancing his own funds in payment of its debts, and then in good faith, and with no purpose to defraud the firm, disposed of the partnership property to an amount less than the sum due himself in satisfaction of a debt due from himself to a third person; and this person received the same in good faith, supposing that the sale was authorized by the firm. It was held that this disposition of the property could not be avoided by another member of the firm, as it appeared that all of the outside debts of the firm had been paid or secured, and that there was nothing due to such other member from the firm.

Equity will not grant the dissolution of a partnership for every trivial violation of duty by one of the partners; but where there is gross misconduct, such as abuse of known au-

¹ Read v. Bailey, 3 App. Cas. 94; Ex parte Smith, 1 Glyn & J. 74. itors. Ib.; Ex parte Sillitoe, 1 Glyn & J. 374, 382; Ex parte Smith, supra.

The case is different where the firm has made contracts with one of its members; in such a case the firm could not prove in competition with the firm cred-

² Ib. Lord Cairns.

³ Corwin v. Suydam, 24 Ohio St. 209; Ex parte Smith, supra.

thority, or gross want of good faith, such as must, if continued, be disastrous to the interests of the other partners, equity will interfere and grant a dissolution.¹ To justify such extraordinary interposition however the court always requires strong evidence either of positive or of meditated abuse. It is not enough to show that there is a temptation to such misconduct, abuse, or bad faith; there must be an unequivocal demonstration, by overt acts or gross departure from duty, that the danger is imminent, or that the injury is already done.² For minor acts of misconduct, equity will ordinarily go no further than to grant an injunction against the partner.³

Though a fraudulently concerted commission of bankruptcy will not be supported, it is not necessary that the sole motive for issuing it should be the distribution of the bankrupt's estate among his creditors. There may be other legitimate grounds upon which it may be supported; for instance, it may not only be prudent, but it may also be perfectly consistent with good faith, to get the bankrupt partner out of the partnership, which might otherwise be ruined by his misconduct. And if this appear to have been, *bona fide*, the object of the commission, it cannot be vitiated thereby. To do this, it is not enough that there has been a bye-motive for taking out the commission, if there has been no fraud.⁴

If two partners enter into a contract for the purpose of defrauding their joint creditors, the one permitting the other to withdraw money out of reach of the creditors, such a contract is of course void towards such creditors.⁵ But the mere fact that when it was determined to dissolve a partnership both partners knew that the joint effects were insufficient to pay the joint debts will not, of itself, be enough to invalidate a dissolution of the firm, if honestly made; though it be one

¹ Story, Partnership, § 287; Story, Equity, § 673; 3 Kent, Com. 60, 61.

² Story, Partnership, § 287; Story, Equity, § 673; 3 Kent, Com. 60, 61.

³ *Ib.*

⁴ *Ex parte Wilbeam*, Buck, 461; 2 Hovenden, Fraud, 160.

⁵ *Anderson v. Maltby*, 2 Ves. Jr. 255.

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of the terms of the dissolution that the retiring shall receive a premium for relinquishing his share business.¹

§ 6. CORPORATIONS.

A majority of the members of a corporation have to exercise the control over the corporate management legitimately belongs to them, for the purpose of appropriating the corporate property or its avails or income to themselves or to any of the shareholders, to the exclusion or prejudice of the others. And if any such unfair advantage has been obtained by fraud or abuse of the trust confided to the officers or agents of the corporation, it is not in the power of a majority to ratify or condone the fraud or breach of trust, so far as it affects the rights of the others, except by reasonable restitution. This is not only true of formal corporate actions, such as assessments of capital or dividends which come,² but also of indirect appropriations of the corporate property, profits, or means of profit, to their own benefit by any portion of the corporators, in fraud of their associates. No act of the majority can purge such fraud. If it were otherwise, the minority would be without the means of protection or redress against inequality and injustice.³

If the charter of a corporation provide that stockholders only shall be elected directors, persons having no interest in the stock, but fraudulently and collusively receiving a transfer of a share to qualify them, are not eligible; and stockholders combining in such fraud have no power to confer upon them authority to do corporate acts. And fraud and combination will prevent those participating from claiming any protection under its provisions to

¹ *Ex parte Peak*, 1 Madd. 854.

² *Preston v. Grand Collier Dock Co.*, 11 Sim. 327; *Hodgkinson v. National Ins. Co.*, 26 Beav. 478.

³ *Wells, J. in Brewer v. Theatre*, 104 Mass. 878, 895; *v. Patchell*, 33 Beav. 595; *At Merryweather*, L. R. 5 Eq. 464,

personal responsibility.¹ So also if the directors of a railway company give away certificates of stock, a major part of the whole issue, to contractors building the road, for the purpose of giving them a controlling influence in the election of officers and in the management of the road, equity will declare the gift void, especially if part of the directors are interested in the contract with the contractors.²

The officers of a corporation are chargeable with fraud, if they receive in payment for stock property at a valuation known to be in excess of its real worth, and thereon issue paid-up certificates of stock. But such a fraud is greatly aggravated when the officers deal with themselves as stockholders, and accept such a conveyance in payment of their own stock.³

Again statutes exist in some of the states, by which holders of stock in a corporation are made chargeable with the frauds of the trustees. But to justify such a thing the facts should obviously be very strong. Thus to charge a holder of stock, issued upon and for the purchase of property, individually for the debts of the corporation, it is not enough that the property has been purchased and paid for at an overvaluation through mistake or error of judgment; the purchase at the price agreed upon must have been in bad faith, to evade the

¹ *Bartholomew v. Bentley*, 1 Ohio St. 37; a. c. 15 Ohio, 666. 'A valid act of incorporation,' said the court, in 15 Ohio, 'or an invalid and pretended right to exercise corporate functions, is alike powerless to secure the guilty from the consequences of their fraudulent conduct where it has been knowingly resorted to as the mere means of chicane and imposition, and used to facilitate the work of deception and injury. . . . If the defendants, with the design to defraud the public generally, have knowingly combined together, and held forth false and deceptive colors, and done

acts which are wrong, and have thereby injured the plaintiff, they must make him whole by responding to the full extent of that injury; and they cannot place between him and justice with any success the charter of the German Bank of Wooster, whether it be valid or void, forfeited or in ease. Neither a good nor a bad thing may be falsely used for purposes of deception, and made a scapegoat for responsibility.'

² *Gilman R. Co. v. Kelly*, 77 Ill. 426; *People v. Logan Co.*, 63 Ill. 374.

³ *Osgood v. King*, 42 Iowa, 478.

statute. The trustees must have deliberately, with knowledge of the real value of the property, overvalued it, and paid for it in stock an amount which they knew was in excess of its value.¹

§ 7. 'HOLDING OUT.'

Cases in which an embarrassed, or indeed an unembarrassed, debtor holds another out as owner of property belonging to the debtor fall within the purpose of the statutes against fraudulent conveyances, and have already been considered.² But it frequently happens that one not a debtor does the same thing; in such a case we may have a subject for the present division of fraud. The law usually operates on lines of estoppel in this class of cases. A holds out B as owner of A's horse, and thereby induces C to buy the horse as B's;³ or A holds out B as his partner, contrary to the fact, and thereby induces C to deal with B on the footing of the holding out;⁴ in these and a vast variety of other like cases the person induced to change his position substantially can insist upon it that the transaction which has taken place shall stand, because the holding out was a fraud.⁵

That particular phase of holding out belongs more properly to the law of deception, and has been referred to in the first volume of this work.⁶ But a recent case⁷ affords us an instance of holding out which properly falls under our head of circumvention. In order to give a company a fictitious credit A placed money with the company's banker, to the company's credit, but to be held on trust for himself. The company fails after some of B's money has been drawn upon, and the

¹ *Douglass v. Ireland*, 73 N. Y. 100, 591; *Bigelow, Estoppel*, 564, 565, Allen, J. 5th ed.

² Ante, pp. 44, note, 331, 333.

⁵ *Bigelow, Estoppel*, chapter 18,

³ *Pickard v. Sears*, 6 Ad. & E. 5th ed. 469; *Bigelow, Estoppel*, 558 et seq., 5th ed.

⁶ See pp. 16, 598.

⁷ *In re Great Berlin Steamboat Co.*

⁴ *Stimson v. Whitney*, 130 Mass. 26 Ch. D. 616, C. A.

question now arises, in the winding up, whether A is entitled to have what remains paid over to him. It was held that he was not; perhaps because A did not claim it before the winding up,¹ though it would seem in principle that the same would have been true at any time in a contest between A and an attaching creditor of the company.

To constitute such holding out it is clear that there need be no personal intention to defraud as there appears to have been in the case just referred to. Mere thoughtlessness in regard to the continuance of a business sign after a dissolution of partnership may be quite enough to give another a fictitious credit, and work the same effect as actual intention; and yet it is common and right to say that the creditor shall have the benefit of the holding out because it would work a *fraud* upon him to hold the contrary. The holding out was deceptive, and the average man would have been guilty of true fraud under the circumstances.²

§ 8. SECRET PREFERENCE IN COMPOSITIONS.

Secret preferences of particular creditors, given as they usually are to induce the favored creditors to become parties to a composition, make cases of deception towards creditors who afterwards become parties to the same without knowledge of what has thus been done. Cases of that sort have been considered in the first volume.³ But the transaction is equally wrongful towards non-assenting creditors who had

¹ Baggallay, L. J.: 'There have been cases in which a party who has parted with his property under a fraudulent arrangement has nevertheless been allowed to recover the property, but this case differs from them in many respects, especially in this, that there was no repudiation till after the commencement of the winding up.'

Lindley, L. J.: 'The object for which the advance was made was attained, as the company continued to

have a fictitious credit till the commencement of the winding up. After that I think it is too late for the appellant to repudiate the bargain and claim the money.'

² There is no holding out by the mere fact that property is given to another in bailment. *Ex parte Salting*, 25 Ch. D. 148, C. A. There must be something in the act of the nature of proprietorship.

³ Vol. 1, pp. 204, 205.

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already become parties to the composition; such though breaches of implied condition, being capable of being treated as circumvention, and so calling for notice by the recent case¹ of the kind was decided by the English Court of Appeal; the case being to the effect following:—

A debtor entered into an arrangement, out of bankruptcy or the operation of any statute, with several of his creditors to whom he called together, by which a deed of composition for 10s. in the pound was executed, for all creditors to assent to who would. Among those who executed the deed was the respondent, who was not induced to do so by any fraudulent representations. Afterwards however other creditors were induced to execute the deed by an arrangement of the debtor's brother, with the debtor's knowledge to make additional payments to them on account of their debts. These payments they received from the brother and then executed the deed. The respondent now contended only that those creditors could not insist upon having the composition arrangement carried out, but that the composition was rendered void; and the court sustained this view, on the ground that it was an implied condition of all such arrangements that all the creditors should stand upon a like footing unless the deed provided otherwise, or unless the payment was given without the debtor's knowledge.²

§ 9. COLLUSION AND CONSPIRACY.

Collusion of any wrongful sort between A and B to infringe the rights of C makes another case of fraud in the way of circumvention. This subject however was disposed of in chapter 8 of the 1st volume, upon the idea that it was in reality a phase of 'deception.' In some of its forms that is not

¹ Ex parte Milner, 15 Q. B. D. 605. knowledge of the debtor; but

² Brett, M. R. : 'I should hesitate to say that this would be so if the preferential payment was made without the knowledge of the debtor in the present case it was made with the knowledge of the debtor.'

true, circumvention and deception going hand in hand in the same transaction, and resulting in a right of action for damages, the characteristic result of deception. In most cases however the subject of collusion, it is now conceived, belongs more properly to the present volume, deception being only a consequence of the collusion and not a part of it. But as the subject has been disposed of in the preceding volume, it will not be gone over again here.

Some remarks should also be made in regard to certain forms of conspiracy, especially of conspiracy in the form of a combination between a debtor and another to defeat the former's creditors. In many cases that may be simply a matter for the operation of the statutes against fraudulent conveyances already disposed of; in other cases it may be a matter for the statutes of attachment, as an evasion of process; in other cases it may be a matter for damages like a simple case of deceit;¹ in still other cases it may be no more than collusion, which, as has just been said, was disposed of in the preceding volume.

§ 10. CONCLUSION.

Many special instances, not here noticed, of circumvention falling under this last division of that subject may doubtless be found;² and special statutes, federal and state. So

¹ Vol. 1, pp. 69, 70, 167, 168, 541, 542. According to the current of authority no action for damages can be maintained against a debtor, or against him and a purchaser from him for conspiracy or collusion between the two to 'defraud' another creditor by getting the debtor's property out of the latter's reach. Vol. 1, pp. 69, 70. But if there has been collusion or conspiracy between the debtor and another to take the property under a fictitious claim and attachment, and the conspiracy is carried out, and a creditor is thereby prevented from

finding any property to satisfy his claim he can, it is held, maintain an action for damages. *Adams v. Paige*, 7 Pick. 542; *Lamb v. Stone*, 11 Pick. 527, 635; *Lamb v. Smith*, 132 Mass. 574; *Quinby v. Strauss*, 90 N. Y. 664. So if a lien obtained by the creditor has been destroyed by the defendants. *Lamb v. Stone*, supra; *Bradley v. Fuller*, 118 Mass. 239. But the wrong in such cases would also fall within the condemnation of the statutes against fraudulent conveyances.

² See ante, pp. 14, 15.

far as special statutes are concerned, they are not of much value in the way of setting out a broad general doctrine of law, and their exposition must often be as special as is their purpose itself.¹ But it is believed that as regards even particular and local statutes which are not in themselves peculiar, and as regards new questions not in themselves peculiar or turning upon peculiar statutes, sufficient has been shown in the preceding pages to indicate the proper view to be taken. That is to say, the question whether fraud as a civil offence has been committed is to be determined by considering whether there has been endeavor to alter rights, by deception where the alleged defrauding and defrauded parties were dealing with each other, by circumvention where they were not; and that in either case the wrongfulness of the endeavor will, except in transactions 'naturally innocent,'² turn upon acts or conduct and not upon personal intention to defraud, though such intention will always make a case.³

¹ Comp. what Mr. Justice Stephen has said in regard to special Acts of Parliament of a criminal nature, as bearing upon the proper legal meaning of the word 'crime.' 'Though closely allied with the criminal law properly so-called, these enactments cannot be said to form part of it. They all depend upon special Acts of Parliament, relating to an immense variety of subjects quite unconnected with each other, and illustrating no general theory or principle.' *General View of the Criminal Law*, p. 8, ed. 1890.

² See ante, pp. 381, 388 et seq. For a probable example, in this last division of circumvention, see *Sewall v. Sewall*, 122 Mass. 156, ante, pp. 14, 15.

³ In the work just cited, p. 76, Mr. Justice Stephen, fixing his attention apparently upon certain common manifestations of fraud, and upon fraud as

a crime, says that the word is 'nearly equivalent to deceiving a man so as to injure him or expose him to the risk of injury.' And then very significantly: 'This definition supplies an answer to the common saying "I did not mean to defraud him, because I meant to pay the money back." To which the answer is, "You did mean to expose him to the risk of your not paying it back."' And the meaning of that, put as it is for a general example, is that even in the criminal law personal intention to defraud does not ordinarily enter into the legal meaning of fraud. The definition just given, it may be added, does not cover the subject of the present volume, unless 'deceiving' is taken in some strained sense; evasion is the characteristic thing here, and there may be no deception in it.

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